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Vol. 55 No. 33

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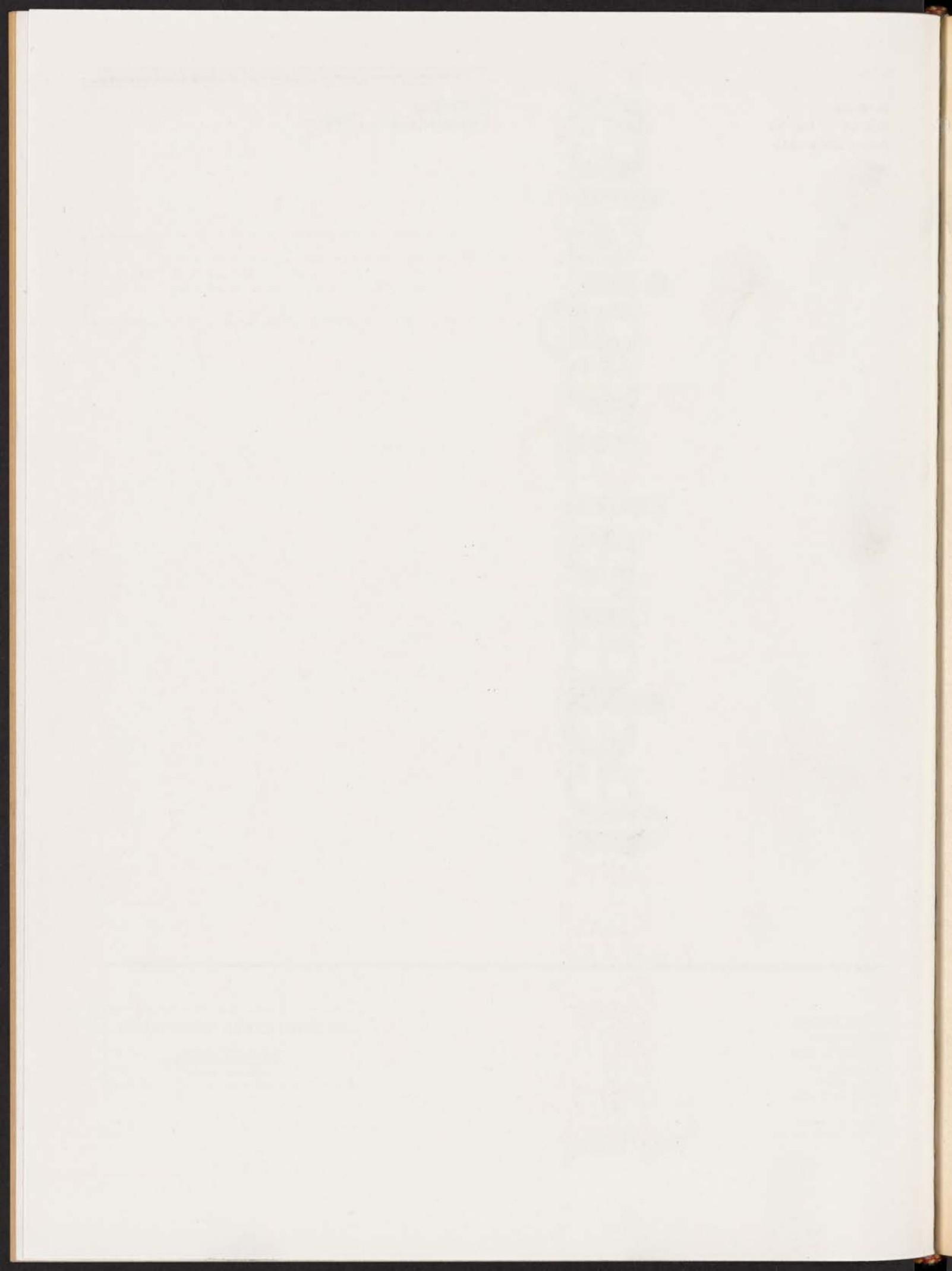
Friday  
February 16, 1990

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Friday  
February 16, 1990

Briefing on How To Use the Federal Register  
For information on a briefing in Washington, DC, see  
announcement on the inside cover of this issue.



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## THE FEDERAL REGISTER

### WHAT IT IS AND HOW TO USE IT

- FOR:** Any person who uses the **Federal Register** and Code of Federal Regulations.
- WHO:** The Office of the **Federal Register**.
- WHAT:** Free public briefings (approximately 3 hours) to present:
1. The regulatory process, with a focus on the **Federal Register** system and the public's role in the development of regulations.
  2. The relationship between the **Federal Register** and Code of Federal Regulations.
  3. The important elements of typical **Federal Register** documents.
  4. An introduction to the finding aids of the FR/CFR system.
- WHY:** To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

### WASHINGTON, DC

- WHEN:** February 23, at 9:00 a.m.  
**WHERE:** Office of the **Federal Register**,  
First Floor Conference Room,  
1100 L Street NW., Washington, DC.  
**RESERVATIONS:** 202-523-5240.

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The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 890

#### **Survivor Benefits, Health Benefits, and Life Insurance for Certain Annuitants; Correction**

**AGENCY:** Office of Personnel Management.

**ACTION:** Interim rule; correction.

**SUMMARY:** This document corrects a paragraph designation contained in interim regulations published January 11, 1990, regarding the eligibility for health, life insurance, and survivor benefits of individuals entitled to an immediate annuity under 5 U.S.C. 8412(g).

**DATES:** Interim regulations are effective January 11, 1990. Comments must be received on or before March 12, 1990.

**ADDRESSES:** Written comments may be sent to Reginald M. Jones, Jr., Assistant Director for Retirement and Insurance Policy, Retirement and Insurance Group, Office of Personnel Management, P.O. Box 57, Washington, DC 20044, or delivered to OPM, Room 4351, 1900 E Street, NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Margaret Sears, (202) 632-4634, extension 207.

U.S. Office of Personnel Management.  
Constance Berry Newman,  
Director.

The following correction is made in the interim regulations published at 55 FR 993 on January 11, 1990:

#### **§ 890.301 [Amended]**

On page 995, the amendatory language and text for paragraph (bb) of § 890.301 is corrected to read "(cc)".

[FR Doc. 90-3710 Filed 2-15-90; 8:45 am]

BILLING CODE 6325-01-M

## Federal Register

Vol. 55, No. 33

Friday, February 16, 1990

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 81

[Docket No. FV-89-212]

#### **Regulation Governing the Fresh Apples Diversion Program for 1988 Crop Apples**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule adopts, without change, the interim rule published in the FEDERAL REGISTER on July 28, 1989 (54 FR 31319) which set forth the terms for conducting the Fresh Apples Diversion Program for the 1988 crop ("Program") pursuant to clause (2) of section 32 of the Act of August 24, 1935 (7 U.S.C. 612c) ("section 32"). The interim rule sets forth the provisions of eligibility for payment, the rate of payment to shippers, and other conditions for participation, including the description of acceptable outlets. The program is intended to encourage the domestic consumption of 1988 crop fresh apples.

**EFFECTIVE DATE:** February 16, 1990.

**FOR FURTHER INFORMATION CONTACT:** Donald A. Thibeault, Chief, Commodity Procurement Branch, Fruit and Vegetable Division, AMS, USDA, Room 2548-South, P.O. Box 96456, Washington, DC 20090-6456; telephone: 202/447-6391.

#### **SUPPLEMENTARY INFORMATION:**

Information collection requirements contained in this subpart have been approved by the Office of Management and Budget (OMB) in accordance with the provisions of 44 U.S.C. chapter 35, and have been assigned OMB control numbers 0581-0162.

This final rule has been reviewed under U.S. Department of Agriculture (USDA) procedures established in accordance with provisions of Executive Order 12291 and Departmental Regulation No. 1512-1 and has been classified "non-major". It has been determined that this rule will not result in: (1) An annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local governments, or geographic regions; or (3) significant

adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States based enterprises to compete with foreign-based enterprises in domestic or export markets.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has determined that this action will not have a significant economic impact on a substantial number of small entities. The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. The Small Business Administration (13 CFR 121.1) has defined small agricultural producers as those having gross revenue for the last three years of less than \$500,000 and small agricultural service firms are defined as those whose gross annual receipts are less than \$3,500,000. Because there was a preponderance of entities shipping fresh apples that met these gross revenue limitations, it was anticipated that the majority of the program participants could be classified as small entities.

An Environmental Evaluation with respect to the Fresh Apples Diversion Program for 1988 crop apples (the "Program") has been completed. It has been determined that this action is not expected to have any significant impact on the quality of the human environment. In addition, it has been determined that this action will not adversely affect environmental factors such as wild life habitat, water quality, air quality, and land use and appearance. Accordingly neither an Environmental Assessment nor an Environmental Impact Statement is needed.

This program/activity is not subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials. See the Notice related to 7 CFR part 3015, subpart V, published at 48 FR 29115 (June 24, 1983).

The title and number of the Federal Assistance Program to which this interim final rule applies is: Title—Section 32 Diversion Program; Number—10.166, as will be found in the 1990 edition of the Catalog of Federal Domestic Assistance.

**Interim Rule**

An interim rule was published in the **Federal Register** at 54 FR 31319 on July 28, 1989, which set forth the terms for conducting the Program pursuant to clause (2) of section 32 of the Act of August 24, 1935 (7 U.S.C. 612c) ("Section 32"). Clause (2) of section 32 authorizes the Secretary of Agriculture to "encourage the domestic consumption of such [agricultural] commodities or products by diverting them, by payment of benefits or indemnities or by other means, from the normal channels of trade and commerce \* \* \*". Section 32 also authorizes the Secretary to use section 32 funds "at such times, in such manner, and in such amounts as the Secretary of Agriculture finds will effectuate substantial accomplishment of any one or more of the purposes of this section." Furthermore, "[d]eterminations by the Secretary as to what constitutes diversion and what constitutes normal channels of trade and commerce and what constitutes normal production for domestic consumption shall be final."

Recent USDA statistics indicate that as of May 1, 1989, the national supply of 1988 crop fresh apples was 53 percent greater than the previous three-year average. Based on these statistics and other market factors the Secretary determined that 1988 crop fresh apples were in surplus supply and that the domestic consumption of such apples would be encouraged by using section 32 funds to divert apples from the normal channels of trade and commerce.

Pursuant to the Program, AMS made payments to participants in the Program on a competitive bid basis for 1988 crop fresh apples meeting U.S. Fancy Grade, 2 1/4 inches minimum diameter, and the U.S. Condition Standards for Export. The apples were packed in cartons of 40-pounds net weight or in bulk bins and were diverted to nontraditional channels of trade and commerce such as charitable organizations, livestock feed operations, or ethanol production facilities. In order to receive payments under the Program, parties, who possessed 1988 crop fresh apples on July 3, 1989, and whose August 2, 1989, bid was accepted by AMS, must have provided proof that by August 31, 1989, the apples were diverted to nontraditional channels of trade and commerce. Requests for payment under the Program were received by September 30, 1989. If AMS was satisfied with the proof of apple diversion, payment was made within 30 days of the request.

**General Summary of Comments**

The public was afforded until August 14, 1989, to comment on the interim rule. USDA received comments with respect to the interim rule and the Program in general from 133 respondents including members of Congress, a state governor, several apple grower organizations, private citizens not affiliated with the apple industry, a national health research group, and a national food bank network. USDA has considered all comments received in developing this final rule. These comments are on file in Room 2548-South Building, 14th and Independence Ave., SW., Washington, DC 20250.

The following is a summary of comments received and actions taken:

*A. Comments*

Of the 133 comments on file, 126 favored the conduct of the Program which encouraged the domestic consumption of 1988 crop fresh apples and thereby lowered the surplus supply of such apples. Six comments expressed concern with the effects of providing for human consumption apples that had been treated with Alar. The remaining comment proposed that the section 32 payments also cover costs for transporting the apples to charitable outlets and for processing the fresh apples into apple juice concentrate.

*B. Discussion and Conclusion*

The comments have been reviewed and it has been determined that the interim rule should be adopted as a final rule, without change. Pursuant to clause (2) of section 32 the domestic consumption of 1988 crop fresh apples was encouraged by diverting them from the normal channels of trade and commerce by making payments to parties possessing eligible apples who diverted those apples by August 31, 1989. Such diversion, which is the responsibility of Program participants, was intended to reduce the surplus of 1988 crop fresh apples and is consistent with the 126 comments favoring a program to assist the lowering of the surplus supply of 1988 crop fresh apples.

The apples eligible under the Program, as well as all apples remaining in the market, were subject to residue tolerance levels for daminozide (also known as Alar) established by the Environmental Protection Agency. Although USDA did not test the apples for Alar, recipient organizations were free to do so. The interim rule did not provide assistance for the transportation of apples to nontraditional outlets or for the costs of processing apples into concentrate. The interim rule defined

"diversion" as the delivery of fresh apples to an eligible outlet. The interim rule did not provide reimbursement for further handling of the apples, transportation charges or further processing for use by an approved outlet. These charges were the responsibility of the diverter and the outlet utilizing the apples. Providing financial assistance for such costs would have decreased the quantity of such apples which were diverted from the normal channels of trade and commerce by use of the section 32 funds made available for this purpose.

**List of Subjects in 7 CFR Part 81**

Animal feeds, Apples, Grant programs-agriculture, Reporting and recordkeeping requirements, Surplus agricultural commodities.

**PART 81—SECTION 32 DIVERSION PROGRAMS****Subpart—Fresh Apples Diversion Program**

Accordingly, the interim rule published at 54 FR 31319 on July 28, 1989, is hereby adopted as a final rule without change.

Signed at Washington, DC on February 13, 1990.

Daniel D. Haley,  
Administrator.

[FR Doc. 90-3698 Filed 2-15-90; 8:45 am]  
BILLING CODE 3410-02-M

**7 CFR Part 907****[Navel Orange Regulation 707]****Navel Oranges Grown in Arizona and Designated Part of California**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This regulation establishes the quantity of California-Arizona navel oranges that may be shipped to domestic markets during the period from February 16 through February 22, 1990. Consistent with program objectives, such action is needed to balance the supplies of fresh navel oranges with the demand for such oranges during the period specified. This action was recommended by the Navel Orange Administrative Committee (Committee), which is responsible for local administration of the navel orange marketing order.

**DATES:** Regulation 707 (7 CFR part 907) is effective for the period from February 16 through February 22, 1990.

**FOR FURTHER INFORMATION CONTACT:**  
Maureen T. Pello, Marketing Specialist,

Marketing Order Administration Branch,  
Fruit and Vegetable Division,  
Agricultural Marketing Service, U.S.  
Department of Agriculture, Room 2523-  
S, P.O. Box 96456, Washington, DC  
20090-6456; telephone: (202) 382-1754.

**SUPPLEMENTARY INFORMATION:**

This final rule is issued under Marketing Order 907 (7 CFR part 907), as amended, regulating the handling of navel oranges grown in Arizona and designated part of California. This order is effective under the Agricultural Marketing Agreement Act of 1937, as amended, hereinafter referred to as the Act.

This final rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of the use of volume regulations on small entities as well as larger ones.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 123 handlers of California-Arizona navel oranges subject to regulation under the navel orange marketing order and approximately 4,065 navel orange producers in California and Arizona. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.2) as those having annual receipts of less than \$500,000, and small agricultural service firms are defined as those whose annual receipts are less than \$3,500,000. The majority of handlers and producers of California-Arizona navel oranges may be classified as small entities.

The California-Arizona navel orange industry is characterized by a large number of growers located over a wide area. The production area is divided into four districts which span Arizona and part of California. The largest proportion of navel orange production is located in District 1, Central California, which represented 85 percent of the total production in 1988-89. District 2 is located in the southern coastal area of California and represented 13 percent of

1988-89 production; District 3 is the desert area of California and Arizona, and it represented approximately 1 percent; and District 4, which represented approximately 1 percent, is northern California. The Committee's estimate of 1989-90 production is 85,500 cars (one car equals 1,000 cartons at 37.5 pounds net weight each), as compared with 70,633 cars during the 1988-89 season.

The three basic outlets for California-Arizona navel oranges are the domestic fresh, export, and processing markets. The domestic (regulated) fresh market is a preferred market for California-Arizona navel oranges. The Committee estimates that about 59 percent of the 1989-90 crop of 85,500 cars will be utilized in fresh domestic channels (50,700 cars), with the remainder being exported fresh (9 percent), processed (30 percent), or designated for other uses (2 percent). This compares with the 1988-89 total of 45,581 cars shipped to fresh domestic markets, about 64 percent of that year's crop.

Volume regulations issued under the authority of the Act and Marketing Order No. 907 are intended to provide benefits to growers. Growers benefit from increased returns and improved market conditions. Reduced fluctuations in supplies and prices result from regulating shipping levels and contribute to a more stable market. The intent of regulation is to achieve a more even distribution of oranges in the market throughout the marketing season.

Based on the Committee's marketing policy, the crop and market information provided by the Committee, and other information available to the Department, the costs of implementing the regulations are expected to be more than offset by the potential benefits of regulation.

Reporting and recordkeeping requirements under the navel orange marketing order are required by the Committee from handlers of navel oranges. However, handlers in turn may require individual growers to utilize certain reporting and recordkeeping practices to enable handlers to carry out their functions. Costs incurred by handlers in connection with recordkeeping and reporting requirements may be passed on to growers.

Major reasons for the use of volume regulations under this marketing order are to foster market stability and enhance grower revenue. Prices for navel oranges tend to be relatively inelastic at the grower level. Thus, even a small variation in shipments can have a great impact on prices and grower revenue. Under these circumstances,

strong arguments can be advanced as to the benefits of regulation to growers, particularly smaller growers.

At the beginning of each marketing year, the Committee submits a marketing policy to the U.S. Department of Agriculture (Department) which discusses, among other things, the potential use of volume and size regulations for the ensuing season. The Committee, in its 1989-90 season marketing policy, considered the use of volume regulation for the season. This marketing policy is available from the Committee or Ms. Pello. The Department reviewed that policy with respect to administrative requirements and regulatory alternatives in order to determine if the use of volume regulations would be appropriate. A "Notice of Marketing Policy" (notice), which summarized the Committee's marketing policy, was prepared by the Department and published in the October 19, 1989, issue of the *Federal Register* (54 FR 42966). The purpose of the notice was to allow public comment on the Committee's marketing policy and the impact of any regulations on small business activities.

The notice provided a 30-day period for the receipt of comments from interested persons. That comment period ended on November 20, 1989. Three comments were received. The Department is continuing its analysis of the comments received, and the analysis will be made available to interested persons. That analysis is assisting the Department in evaluating recommendations for the issuance of weekly volume regulations.

The Committee met publicly on February 13, 1990, in Bakersfield, California, to consider the current and prospective conditions of supply and demand and recommended, with six members voting in favor, four opposing, and one abstaining, that 1,850,000 cartons is the quantity of navel oranges deemed advisable to be shipped to fresh domestic markets during the specified week. The marketing information and data provided to the Committee and used in its deliberations was compiled by the Committee's staff or presented by Committee members at the meeting. This information included, but was not limited to, pride data for the previous week from Department market news reports and other sources, preceding week's shipments and shipments to date, crop conditions, weather and transportation conditions, and a reevaluation of the prior week's recommendation in view of the above.

The Department reviewed the Committee's recommendation in light of

the Committee's projections as set forth in its 1989-90 marketing policy. This recommended amount is 150,000 cartons more than estimated in the January 9, 1990, tentative shipping schedule. Of the 1,850,000 cartons, 1,610,000 are allotted for District 1 and 240,000 are allotted for District 2. Districts 3 and 4 are not regulated since approximately 86 percent of District 3's crop and 79 percent of District 4's crop to date have been utilized and handlers would not be able to utilize their allotments.

During the week ending on February 8, 1990, shipments of navel oranges to fresh domestic markets, including Canada, totaled 2,032,000 cartons compared with 1,889,000 cartons shipped during the week ending on February 9, 1989. Export shipments totaled 288,000 cartons compared with 221,000 cartons shipped during the week ending on February 9, 1989. Processing and other uses accounted for 690,000 cartons compared with 664,000 cartons shipped during the week ending on February 9, 1989.

Fresh domestic shipments to date this season total 25,159,000 cartons compared with 20,331,000 cartons shipped by this time last season. Export shipments total 3,978,000 cartons compared with 3,179,000 cartons shipped by this time last season. Processing and other use shipments total 6,779,000 cartons compared with 6,341,000 cartons shipped by this time last season.

For the week ending on February 8, 1990, regulated shipments of navel oranges to the fresh domestic market were 1,981,000 cartons on an adjusted allotment of 2,074,000 cartons which resulted in net undershipments of 93,000 cartons. Regulated shipments for the current week (February 9 through February 15, 1990) are estimated at 1,850,000 cartons on an adjusted allotment of 1,908,000 cartons. Thus, undershipments of 58,000 cartons could be carried over into the week ending on February 22, 1990.

The average f.o.b. shipping point price for the week ending on February 8, 1990, was \$7.33 per carton based on a reported sales volume of 1,739,000 cartons compared with last week's average of \$7.45 per carton on a reported sales volume of 1,686,000 cartons. The season average f.o.b. shipping point price to date is \$7.67 per carton. The average f.o.b. shipping point price for the week ending on February 9, 1989, was \$6.45 per carton; the season average f.o.b. shipping point price at this time last season was \$7.82 per carton.

According to a February 9 crop report issued by the National Agricultural Statistics Service, citrus production as of February 1 is forecast at 9.92 million

tons, 3 percent greater than in January but 23 percent below last season. This reduction was due to the severe freezing temperatures in the Florida and Texas citrus belts during late December. Fruit droppage was heavy in most areas of Florida and the Texas harvest has ended. Orange production is up 17 percent from a January 1 forecast but 19 percent below last season. This decline was due mostly to Florida's 32 percent decrease from last season. The severe December freeze in Florida's citrus belt further reduced an already short Florida orange crop. The increase since January reflected better than expected salvage operations in Florida and increased production expectations in California.

The Department's Market News Service reported that, as of February 13, overall demand for California-Arizona navel oranges was fairly good and the market was about steady. Some Committee members characterized demand as fair to dull. Other members reported that the market was firm. A fair amount of price discounting for all sizes was also reported by Committee members. Committee members and observers discussed different levels of allotment as well as open movement. However, only two Committee members favored open movement while two other members favored a lower allotment level. The majority of Committee members favored continuation of volume regulation at this time to maintain the market stability.

The 1988-89 season average fresh equivalent on-tree price for California-Arizona navel oranges was \$3.86 per carton, 65 percent of the season average parity equivalent price of \$5.98 per carton.

Based upon fresh utilization levels indicated by the Committee and an econometric model developed by the Department, the 1989-90 season average fresh on-tree price is estimated to be between \$4.59 and \$4.84 per carton. This range is equivalent to 73 to 76 percent of the projected season average fresh on-tree parity equivalent price of \$6.33 per carton. Thus, the 1989-90 season average fresh on-tree price is not expected to exceed the projected season average fresh on-tree parity equivalent price.

Limiting the quantity of navel oranges that may be shipped during the period from February 16 through February 22, 1990, would be consistent with the provisions of the marketing order by tending to establish and maintain, in the interest of producers and consumers, an orderly flow of navel oranges to market.

Based on considerations of supply and market conditions, and the evaluation of alternatives to the implementation of this volume regulation, the

Administrator of the AMS has determined that this final rule will not have a significant economic impact on a substantial number of small entities and that this action will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is further found and determined that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice, engage in further public procedure with respect to this action and that good cause exists for not postponing the effective date of this action until 30 days after publication in the *Federal Register*. This is because there is insufficient time between the date when information became available upon which this regulation is based and the effective date necessary to effectuate the declared policy of the Act.

In addition, market information needed for the formulation of the basis for this action was not available until February 13, 1990, and this action needs to be effective for the regulatory week which begins on February 16, 1990. Further, interested persons were given an opportunity to submit information and views on the regulation at an open meeting, and handlers were apprised of its provisions and effective time. It is necessary, therefore, in order to effectuate the declared purposes of the Act, to make this regulatory provision effective as specified.

#### List of Subjects in 7 CFR Part 907

Marketing agreements, Oranges, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 907 is amended as follows:

#### PART 907—[AMENDED]

1. The authority citation for 7 CFR part 907 continues to read as follows:

Authority: Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.

2. Section 907.1007 is added to read as follows:

Note: This section will not appear in the annual Code of Federal Regulations.

#### § 907.1007 Navel Oranges Regulation 707.

The quantity of navel oranges grown in California and Arizona which may be handled during the period from February 16 through February 22, 1990, is established as follows:

(a) District 1: 1,610,000 cartons; (b) District 2: 240,000 cartons; (c) District 3: unlimited cartons; (d) District 4: unlimited cartons.

Dated: February 14, 1990.

Robert C. Keeney,  
Deputy Director, Fruit and Vegetable  
Division.

[FR Doc. 90-3857 Filed 2-15-90; 8:45 am]

BILLING CODE 3410-02-M

## 7 CFR Part 910

[Lemon Regulation 705]

### Lemons Grown in California and Arizona; Limitation of Handling

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** Regulation 705 establishes the quantity of fresh California-Arizona lemons that may be shipped to market at 325,000 cartons during the period from February 18, 1990, through February 24, 1990. Such action is needed to balance the supply of fresh lemons with market demand for the period specified, due to the marketing situation confronting the lemon industry.

**DATES:** Regulation 705 (7 CFR part 910) is effective for the period from February 18, 1990, through February 24, 1990.

**FOR FURTHER INFORMATION CONTACT:** Beatriz Rodriguez, Marketing Specialist, Marketing Order Administration Branch, F&V, AMS, USDA, Room 2523, South Building, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 475-3861.

**SUPPLEMENTARY INFORMATION:** This final rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

The purpose of the RFA is to fit regulatory action to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Agricultural Marketing Agreement Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 85 handlers of lemons grown in California and Arizona subject to regulation under the lemon marketing order and

approximately 2,500 producers in the regulated area. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.2) as those having annual receipts of less than \$500,000, and small agricultural service firms are defined as those whose annual receipts are less than \$3,500,000. The majority of handlers and producers of California-Arizona lemons may be classified as small entities.

This regulation is issued under Marketing Order No. 910, as amended (7 CFR part 910), regulating the handling of lemons grown in California and Arizona. The order is effective under the Agricultural Marketing Agreement Act (the "Act," 7 U.S.C. 601-674), as amended. This action is based upon the recommendation and information submitted by the Lemon Administrative Committee (Committee) and upon other available information. It is found that this action will tend to effectuate the declared policy of the Act.

This regulation is consistent with the California-Arizona lemon marketing policy for 1989-90. The Committee met publicly on February 13, 1990, in Los Angeles, California, to consider the current and prospective conditions of supply and demand and unanimously recommended a quantity of lemons deemed advisable to be handled during the specified week. The Committee reports that overall demand for lemons is excellent.

Pursuant to 5 U.S.C. 553, it is further found that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice and engage in further public procedure with respect to this action and that good cause exists for not postponing the effective date of this action until 30 days after publication in the *Federal Register* because of insufficient time between the date when information became available upon which this regulation is based and the effective date necessary to effectuate the declared purposes of the Act. Interested persons were given an opportunity to submit information and views on the regulation at an open meeting. It is necessary, in order to effectuate the declared purposes of the Act, to make these regulatory provisions effective as specified, and handlers have been apprised of such provisions and the effective time.

#### List of Subjects in 7 CFR Part 910

Lemons, Marketing agreements, and Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 910 is amended as follows:

## PART 910—LEMONS GROWN IN CALIFORNIA AND ARIZONA

1. The authority citation for 7 CFR part 910 continues to read as follows:

**Authority:** Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.

**Note:** This section will not appear in the Code of Federal Regulations.

2. Section 910.705 is added to read as follows:

### Section 910.705 Lemon Regulation 705.

The quantity of lemons grown in California and Arizona which may be handled during the period from February 18, 1990, through February 24, 1990, is established at 325,000 cartons.

Dated: February 14, 1990.

Robert C. Keeney,  
Deputy Director, Fruit and Vegetable  
Division.

[FR Doc. 90-3856 Filed 2-15-90; 8:45 am]

BILLING CODE 3410-02-M

## 7 CFR Part 910

[Lemon Regulation 702, Amdt. 1]

### Lemons Grown in California and Arizona; Limitation of Handling

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This action increases the quantity of fresh California-Arizona lemons that may be shipped to market during the period from January 28 through February 3, 1990. Such action is needed to balance the supply of fresh lemons with market demand for the period specified, due to the marketing situation confronting the lemon industry.

**DATES:** Regulation 702, Amendment 1 (7 CFR part 910) is effective for the period from January 28 through February 3, 1990.

**FOR FURTHER INFORMATION CONTACT:** Beatriz Rodriguez, Marketing Specialist, Marketing Order Administration Branch, F&V, AMS, USDA, Room 2523, South Building, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 475-3861.

**SUPPLEMENTARY INFORMATION:** This final rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service has determined that this action will not have a significant

economic impact on a substantial number of small entities.

The purpose of the RFA is to fit regulatory action to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Agricultural Marketing Agreement Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 85 handlers of lemons grown in California and Arizona subject to regulation under the lemon marketing order and approximately 2,500 producers in the regulated area. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.2) as those having annual receipts of less than \$500,000, and small agricultural service firms are defined as those whose annual receipts are less than \$3,500,000. The majority of handlers and producers of California-Arizona lemons may be classified as small entities.

This amendment is issued under Marketing Order No. 910, as amended (7 CFR part 910), regulating the handling of lemons grown in California and Arizona. The order is effective under the Agricultural Marketing Agreement Act (the "Act," 7 U.S.C. 601-674), as amended. This action is based upon the recommendation and information submitted by the Lemon Administrative Committee (Committee) and upon other available information. This action amends § 910.702 (Lemon Regulation No. 702) which was published in the *Federal Register* on January 29, 1990 (55 FR 2803). It is found that this action will tend to effectuate the declared policy of the Act.

This action is consistent with the California-Arizona lemon marketing policy for 1989-90. The Committee met publicly on January 30, 1990, in Los Angeles, California, to consider the current and prospective conditions of supply and demand and unanimously recommended that the quantity of lemons deemed advisable to be handled during the specified week be increased from 265,000 cartons to 295,000 cartons. The Committee reports that the demand for lemons has improved beyond that which was anticipated by the Committee on January 23, 1990, when the 265,000 carton recommendation was made.

Pursuant to 5 U.S.C. 553, it is further found that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice and

engage in further public procedure with respect to this action and that good cause exists for not postponing the effective date of this action until 30 days after publication in the *Federal Register* because of insufficient time between the date when information became available upon which this regulation is based and the effective date necessary to effectuate the declared purposes of the Act. Interested persons were given an opportunity to submit information and views on this action at an opening meeting. It is necessary, in order to effectuate the declared purposes of the Act, to make this action effective as specified, and handlers have been apprised of such provisions and the effective time.

#### List of Subjects in 7 CFR Part 910

Arizona, California, Lemons, Marketing agreements, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 910 is amended as follows:

#### PART 910—LEMONS GROWN IN CALIFORNIA AND ARIZONA

1. The authority citation for 7 CFR part 910 continues to read as follows:

*Authority: Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.*

*Note.—This section will not appear in the Code of Federal Regulations.*

2. Section 910.702 is revised to read as follows:

##### § 910.702 Lemon Regulation 702, Amendment 1.

The quantity of lemons grown in California and Arizona which may be handled during the period from January 28, 1990, through February 3, 1990, is established at 295,000 cartons.

Dated: January 31, 1990.

**Robert C. Keeney,**

*Deputy Director, Fruit and Vegetable Division.*

[FR Doc. 90-3699 Filed 2-15-90; 8:45 am]

BILLING CODE 3410-02-M

#### 7 CFR Part 920

[Docket No. FV-90-117]

#### Kiwifruit Grown in California; Relaxation of Minimum Net Weight Tolerance

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Interim final rule with request for comments.

**SUMMARY:** This interim final rule relaxes the minimum net weight tolerance for California kiwifruit packed in trays. The intent of this action is to enable handlers to have their fruit inspected under a relaxed minimum net weight requirement, which will assist handlers in providing an adequate supply of quality California kiwifruit during the remainder of the 1989-90 shipping season.

**DATES:** The interim final rule is effective February 16, 1990; comments which are received by March 19, 1990, will be considered prior to issuance of a final rule.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this action to: Docket Clerk, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2525-S, Washington, DC 20090-6456. Three copies of all written material shall be submitted, and they will be made available for public inspection at the Office of the Docket Clerk during regular business hours. All comments should reference the docket number and the date and page number of this issue of the *Federal Register*.

**FOR FURTHER INFORMATION CONTACT:** Kenneth G. Johnson, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2525-S, Washington, DC 20090-6456, telephone (202) 447-5331.

**SUPPLEMENTARY INFORMATION:** This rule is issued under Marketing Agreement and Marketing Order No. 920 (7 CFR part 920), regulating the handling of kiwifruit grown in California. The marketing agreement and order are authorized by the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the Act.

This interim final rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about

through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 145 handlers of California kiwifruit subject to regulation under the marketing order, and approximately 1,225 producers in the production area. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.2) as those having annual receipts less than \$500,000, and small agricultural service firms are defined as those whose annual receipts are less than \$3,500,000. The majority of the handlers and producers of California kiwifruit may be classified as small entities.

Under the terms of the marketing order, fresh market shipments of kiwifruit are subject to grade, size, maturity, pack and container requirements. The handling requirements for fresh California kiwifruit are specified in 7 CFR 920.302 (as amended at 53 FR 48513, December 1, 1988, and 54 FR 41436, October 10, 1989). Current requirements include the specifications that such shipments be at least Size 49 and contain a minimum of 6.5 percent soluble solids. Also included in the handling regulation are a minimum grade requirement and a number of pack and container requirements.

On October 10, 1989, kiwifruit packed in trays became subject to minimum net weight requirements for the first time. The established minimum net weights vary with the size of the fruit packed, with the smallest fruit subject to the lowest specified minimum net weight. For example, fruit of Size 44 or smaller packed in trays is required to weigh at least 6½ pounds per tray, and fruit of Size 34 and larger must weigh at least 7½ pounds. These net weight requirements were established to eliminate the wide variances that previously existed in the weight of fruit packed in trays and the resulting buyer dissatisfaction.

The current weight requirements specify that at least 90 percent of the sample units taken from each lot must meet the applicable specified minimum net weight, but that no sample unit may be more than ¼-pound or 4 ounces less than the weight. This tolerance is provided to allow for reasonable variations that occur in kiwifruit packing operations, while maintaining the objective of standardizing the weight of fruit packed in trays.

The Kiwifruit Administrative Committee (committee) met on November 21, 1989, and unanimously recommended relaxing the minimum net weight tolerance for kiwifruit packed in

trays for the remainder of the 1989–90 season.

Kiwifruit grown in California is typically harvested in late September or early October. The fruit is packed shortly after harvest and placed into storage until shipment. The shipping season generally extends through the following May.

About 55 percent of the harvested fruit is inspected as it is being packed prior to storage. In accordance with the inspection requirements established under the marketing order, the applicable inspection certificates are valid until January 15 or 21 days from the date of inspection, whichever is later. If a lot of kiwifruit is shipped after the applicable inspection certificate has become invalid, a second inspection is necessary. However, minimum net weight requirements apply only at the time of the initial inspection. Thus, kiwifruit inspected and meeting minimum net weight requirements at the time of packing need not be weighed again prior to shipment.

The 1989 California kiwifruit crop has now been harvested, packed and placed into storage. Handlers who chose to have their fruit inspected during packing experienced few problems meeting the newly established minimum net weight requirements. However, handlers who did not have their fruit inspected prior to storage have expressed concerns that they may experience difficulties in meeting these requirements, particularly late in the shipping season.

While the majority of fruit is inspected prior to storage, some handlers have their fruit inspected after storage just prior to shipment. Because of potential weight changes during storage, such handlers are uncertain as to whether their packed fruit will be able to meet the newly established weight requirements.

Some information indicates that kiwifruit can gain weight in storage as starches convert to sugar. However, research also indicates that during storage kiwifruit can lose up to 3 percent of its weight due to moisture loss, depending upon a number of variables including storage conditions, the length of time in storage, the maturity of the fruit at harvest, and conditions during the growing season. If actual weight changes occur in the stored kiwifruit, in particular a weight reduction due to moisture loss, and such losses during the current season exceed those anticipated, the minimum net weight requirements could result in a significant volume of kiwifruit failing to meet the handling regulation and thereby being precluded from entering fresh market channels.

In determining how to reduce this risk, the committee considered a number of alternatives, including eliminating the minimum net weight requirements altogether. However, the committee deemed that such an action would be contrary to the industry's objective of providing uniformly packed kiwifruit to the trade. Therefore, the committee recommended that the tolerance provided in the minimum net weight provisions be increased by 10 percent to 20 percent. The committee believes that this increased tolerance for underweight fruit will assist handlers in providing an adequate supply of quality California kiwifruit throughout the current shipping season, without allowing an excessive amount of variability in the weight of kiwifruit packed in trays.

The committee recommended that this additional tolerance be provided for the remainder of the 1989–90 shipping season only. While the committee continues to support a lower tolerance for underweight fruit, it also believes that the lack of information on fruit weight loss during storage justifies a relaxation at the present time. Experience during the current shipping season should provide additional data on this subject, which would be used by the committee in reevaluating the minimum net weight requirements well in advance of harvest of the 1990 crop.

Based on the above, the Administrator of the AMS has determined that this action will not have a significant economic impact on a substantial number of small entities.

After consideration of all relevant matter presented, including the information and recommendations submitted by the committee and other available information, it is hereby found that this rule, as hereinafter set forth, will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined upon good cause that it is impracticable, unnecessary and contrary to the public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this action until 30 days after publication in the *Federal Register* because: (1) Shipments of kiwifruit from the production area have already begun and, to be of maximum benefit, this relaxation should apply to as many shipments of kiwifruit as possible; (2) kiwifruit shippers are aware of this action which was recommended by the committee at its November 21, 1989, public meeting; (3) this interim final rule represents a relaxation in the requirements and requires no special

preparation on the part of handlers; and (4) this interim final rule provides a 30-day comment period and all comments timely received will be considered prior to finalization of the rule.

#### List of Subjects in 7 CFR Part 920

California, Kiwifruit, Marketing agreements.

For the reasons set forth in the preamble, 7 CFR part 920 is amended as set forth below.

#### PART 920—KIWIFRUIT GROWN IN CALIFORNIA

1. The authority citation for 7 CFR part 920 continues to read as follows:

Authority: Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.

2. Section 920.302 is amended by revising the last sentence in paragraph (a)(4)(ii) to read as follows:

Note.—This section will be published in the annual Code of Federal Regulations.

#### § 920.302 Handling regulation.

(a) \* \* \*

(4) \* \* \*

(ii) \* \* \* At least 80 percent of the sample units, by count, in a lot must meet the specified minimum net weight, but no sample unit may be more than  $\frac{1}{4}$  pound or 4 ounces less than such weight. *Provided*, That this requirement ends on July 31, 1990. Commencing on August 1, 1990, and thereafter, at least 90 percent of the sample units, by count, in a lot must meet the specified minimum net weight, but no sample unit may be more than  $\frac{1}{4}$  pound or 4 ounces less than such weight.

\* \* \* \* \*

Dated: February 13, 1990.

**Robert C. Keeney,**

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 90-3700 Filed 2-15-90; 8:45 am]

BILLING CODE 3410-02-M

#### 7 CFR Part 993

[AMS-FV-90-115IFR]

#### Dried Prunes Produced in California; Changes in Producer District Boundaries

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Interim final rule with request for comments.

**SUMMARY:** This interim final rule invites comments on a revision of the administrative rules and regulations established under the Federal marketing order for dried prunes produced in

California. The rule will change the boundaries of the districts established for independent producer representation on the Prune Marketing Committee (PMC). The marketing order requires that these districts be divided as equally as practicable in terms of the number of independent producers and their collective dried prune production. Some producer and production shifts have occurred within the California production area which require changes in the current districts to bring them in line with order requirements. This action is based on a recommendation of the PMC, which is responsible for local administration of the order, and other available information.

**EFFECTIVE DATES:** Interim final rule effective February 16, 1990. Comments which are received by March 19, 1990 will be considered prior to any finalization of this interim final rule.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this proposal. Comments must be sent in triplicate to the Docket Clerk, Marketing Order Administration Branch, F&V, AMS, USDA, Room 2525-S, P.O. Box 96456, Washington, DC 20090-6456. Comments should reference the docket number and the date and page number of this issue of the Federal Register and will be available for public inspection in the Office of the Docket Clerk during regular business hours.

**FOR FURTHER INFORMATION CONTACT:** Allen Belden, Marketing Specialist, Marketing Order Administration Branch, F&V, AMS, USDA, Room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 475-3923.

**SUPPLEMENTARY INFORMATION:** This interim final rule is issued under marketing agreement and Order No. 993 (7 CFR part 993), both as amended, hereinafter referred to as the "order," regulating the handling of dried prunes produced in California. The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act."

This interim final rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order

that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both the RFA and the Act have small entity orientation and compatibility.

There are approximately 15 handlers of dried prunes who are subject to regulation under the dried prune marketing order and approximately 1,200 producers in the regulated area. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.2) as those having annual receipts of less than \$500,000, and small agricultural service firms are defined as those whose annual receipts are less than \$3,500,000. The majority of handlers and producers of California dried prunes may be classified as small entities.

This interim final rule revises the boundaries of the seven districts established for independent producer representation on the PMC to ensure that, as far as practicable, each district represents an equal number of producers and an equal volume of prunes grown by such producers. It is the view of AMS that the change will not impose any additional regulatory, informational, or cost requirements on handlers or producers.

This action revises § 993.128 of Subpart—Administrative Rules and Regulations and is based on a unanimous recommendation of the PMC and other available information.

Section 993.24 of the order provides that the PMC shall consist of 22 members, of which 14 shall represent producers, seven shall represent handlers, and one shall represent the public. The 14 producer member positions are apportioned between cooperative producers and independent producers in the same proportion, as nearly as practicable, as the percentage of the total prune tonnage handled by the respective cooperative or independent handler group during the year preceding the year in which nominations are made is to the total handled by all handlers. In recent years, the cooperative producers and the independent producers have each been eligible to nominate seven members.

Section 993.28 of the order provides that, for independent producers, the PMC shall, with the approval of the Secretary of Agriculture, divide the production area into districts, giving, insofar as practicable, equal representation throughout the

production area by numbers of independent producers and production of prune tonnage by such producers. When revisions are required, the PMC must make its recommendations to the Secretary of Agriculture to change the district boundaries prior to January 31 of any year in which nominations are to be made. Nominations are made in all even-numbered years, including 1990.

The PMC made a recommendation to change the independent producer district boundaries at its November 30, 1989, meeting. The recommendation was made because, since the last redistricting in 1982, the number of producers and volume of production in most districts has changed, causing imbalances among some of the districts. Thus, redistricting is needed to bring current districts in line with order requirements.

This interim final rule will remove Colusa County from District No. 7 and add it to District No. 2. Lake, Mendocino, Napa, and Sonoma counties will be removed from District No. 3 and added to District No. 4. Sutter County, which is currently divided between Districts No. 1 and No. 2, will be divided among Districts No. 1, No. 2, and No. 3. The boundaries of Districts No. 5 and No. 6 will remain the same. The counties of Humboldt, Trinity, Del Norte, and Siskiyou now named in District No. 3 will not be named in the redistricting because they are no longer significant prune-producing counties. Unspecified counties are included in District No. 4.

In arriving at its recommendation, the PMC calculated the percentage of total independent prune growers for each proposed district and the percentage of total independent prune tonnage for each proposed district. These two percentages were averaged for each district to determine a representation factor for each district. The optimal representation factor for each of the seven districts was determined to be 14.29 percent ( $100\text{ percent} \div 7$ ).

The representation factors for each of the seven new districts are shown below based on the 1988-89 crop year. The representation factors for the old districts based on the 1988-89 crop year are shown as a basis for comparison.

District	Representation factor	
	Old districts (percent)	New districts (percent)
1 .....	17.38	13.10
2 .....	17.38	13.10
3 .....	6.89	13.10

District	Representation factor	
	Old districts (percent)	New districts (percent)
4 .....	12.85	16.91
5 .....	12.03	12.03
6 .....	16.59	16.59
7 .....	16.90	15.19

The recommended method for redistricting was deemed to be desirable as it allowed each district to approximate the optimal representation factor, while maintaining a continuous geographic boundary for each district. In addition, several of the districts whose representation factors are below the optimum are expected to experience production increases in the next few years which are likely to be above the industry average.

Based on the above, the Administrator of the AMS has determined that the issuance of this interim final rule will not have a significant economic impact on a substantial number of small entities.

After consideration of all relevant matter presented, including the Board's recommendation and other available information, it is found that the changes hereinafter set forth will tend to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is also found and determined that, upon good cause, it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect, and that good cause exists for not postponing the effective date of this action until 30 days after publication in the *Federal Register* because: (1) The order requires that independent producer nomination meetings be held for each of the seven districts prior to March 8, 1990, for the term of office beginning June 1, 1990, and this action should be in place before those meetings; (2) this action does not impose additional regulatory requirements on handlers or producers and, therefore, neither handlers nor producers need additional time to comply; (3) the industry is aware of this action, which was recommended by the PMC at an open meeting; and (4) this action provides 30 days for interested persons to file comments.

#### List of Subjects in 7 CFR Part 993

Marketing agreements, Plums, Prunes, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 993 is amended as follows:

#### PART 993—DRIED PRUNES PRODUCED IN CALIFORNIA

1. The authority citation for 7 CFR part 993 continues to read as follows:

Authority: Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-74.

#### Subpart—Administrative Rules and Regulations

2. Section 993.128 is amended by revising paragraph (a) to read as follows:

Note: The following section will be published in the annual Code of Federal Regulations.

#### § 993.128 Nominations for membership.

(a) *Districts.* In accordance with the provisions of section 993.28, the districts referred to therein are described as follows:

*District No. 1.* That portion of Sutter County north of a line extending along Clark Road easterly to the Yuba County line and westerly to the Colusa County line.

*District No. 2.* All of Colusa County and that portion of Sutter County north of a line extending along Oswald Road easterly to the Yuba County line and westerly to the Colusa County line except that portion included in District 1.

*District No. 3.* All of Yolo County and that portion of Sutter County not included in Districts 1 and 2.

*District No. 4.* The counties of Fresno, Kern, Lake, Mendocino, Merced, Napa, San Benito, San Joaquin, Sacramento, Santa Clara, Solano, Sonoma, Stanislaus, Tulare, and all other counties not included in Districts 1, 2, 3, 5, 6, and 7.

*District No. 5.* Butte County.

*District No. 6.* Yuba County.

*District No. 7.* The counties of Glenn, Shasta, and Tehama.

\* \* \* \* \*

Dated: February 13, 1990.

Robert C. Keeney,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 90-3701 Filed 2-15-90; 8:45 am]

BILLING CODE 3410-02-M

**DEPARTMENT OF JUSTICE****Immigration and Naturalization Service****8 CFR Parts 214 and 274a**

[INS Number: 1125-90]

**Nonimmigrant Classes: Special Requirements for Admission, Extension and Maintenance of Status, Control of Employment of Aliens****AGENCY:** Immigration and Naturalization Service, Justice.**ACTION:** Final rule.

**SUMMARY:** This rule revises the regulations of the Immigration and Naturalization Service ("Service") relating to employment authorization for dependents of certain foreign government and international organization officials classified as A-1, A-2, G-1 and G-4 nonimmigrants. It also allows dependents of certain representatives to international organizations classified as G-3 to apply for employment authorization. These actions are being taken in order to improve employment opportunities for dependents of United States officials stationed abroad by making bilateral agreements more attractive for dependents of foreign officials stationed in the United States and to conform the regulations with the provisions of the Immigration Reform and Control Act of 1986 (IRCA). This rule balances international obligations, administrative requirements and proper enforcement concerns.

**EFFECTIVE DATE:** This rule is effective February 16, 1990.

**FOR FURTHER INFORMATION CONTACT:**  
Jack Tabaka, Senior Immigration Examiner, Immigration and Naturalization Service, 425 I Street, NW., Room 7122, Washington, DC 20536, Telephone (202) 633-3240.

**SUPPLEMENTARY INFORMATION:** An interim rule with request for comment was published at 53 FR 46850 and became effective on November 21, 1988. During the comment period, a state university, a law firm, two international organizations, and a United States citizen employee of an international organization submitted a total of five comments. Three additional international organizations submitted untimely comments which the Service accepted. Most comments focused on the G-4 regulations. The Service and the Department of State have carefully reviewed and considered all the points raised. A summary of the comments follow:

(1) **Comment:** Six parties disagreed with using the age of a G-4's son or daughter as a criterion in determining his/her eligibility for dependent employment authorization. Two of the parties pointed to past regulations to support the position that there should be no age limits. One party referred to a 1949 letter from the Department of State to support its view. Two parties, while disapproving of the use of age as a criterion, suggested a compromise by raising the ages specified in the regulations. One suggested age 30; another suggested age 25. One party stated that any age requirement should be dropped since G-4 dependents (except for students) cannot work in Schedule B jobs.

**Response:** The age limits established for the non-spouse dependents of A-1, A-2, G-1 and G-4 principal aliens are reasonable and are based on a Department of State survey of international practices and agreements on this issue. By establishing age criteria, the Service is correcting an anomaly in the prior regulations governing dependent employment. The prior regulations allowed unmarried children of any age to be considered dependents for employment purposes under de facto arrangements while they limited unmarried children to a definite age under bilateral agreements. The ages under bilateral agreements are established by formal negotiations and, therefore, must be considered benchmarks. It follows that the ages for de facto employment should not be more generous. The regulations governing G-4 dependent employment continue to follow the regulations governing dependents under de facto arrangements, as they have for more than ten years. No convincing argument has been advanced why the son or daughter of an international organization employee deserves preferential employment opportunities when compared to the child of a diplomat whose government has entered into a bilateral agreement or de facto arrangement. The 1949 letter which one organization provided has been superseded by legislative and regulatory activity since that time, including the passage of the Immigration Reform and Control Act of 1986 (IRCA). Finally, age criteria for employment authorization are consistent with those for granting privileges and immunities to children, unmarried sons and daughters of A and G principal aliens. The Service and the Department of State considered the view that non-spouse G-4 dependents should not have an employment age cap because they cannot work in Schedule B jobs (except for students). However, the

Schedule B argument was not found to be germane to the issue conforming with accepted international practices.

(2) **Comment:** One party disagreed with reciprocity for G-1 dependent employment. Five parties disagreed with any reciprocity for G-4 dependent employment, while one party applauded the measure.

**Response:** The decision to apply reciprocity to G-1s and G-4s was made only after the Department of State and the Service individually and jointly gave thorough consideration to the issue and its implications. It should be noted that reciprocity for G-1s is included in some of the bilateral dependent employment agreements that the United States has with foreign states. The reciprocity provision affecting G-4s is very limited, affecting nationals of fewer than a dozen countries. The party that favored reciprocity believed that the reciprocity provision could improve the employment opportunities for dependents of United States citizen employees of international organizations stationed abroad.

(3) **Comment:** The interim regulations established 23 as the maximum age for employment authorization for de facto and G-4 nonspouse dependents. Dependents who had employment authorization under the prior regulations, but who would not qualify under the interim regulations, were allowed to continue working for up to 90 days after the effective date of the interim regulations. Three parties stated that this transition period was inadequate for dependent G-4s.

**Response:** The transition period was established after consultation with and concurrence from the Department of State. The Service believes the 90-day grace period was sufficient.

(4) **Comment:** Three parties characterized the regulations as arbitrary, capricious and/or harsh when dealing with G-4 dependents.

**Response:** The Service worked closely with the Department of State in all phases of developing these regulations. As part of the process, the Department of State surveyed the policy and practices of other countries. The resulting regulations reflect the application of a reasonable standard based on common international practice. If anything, the regulations are generous in dealing with the dependents of G-4 international organization employees. Not all host countries allow dependent employment to the same extent.

(5) **Comment:** Three parties commented on what they believed to be changes in requirements for G-4

dependent employment, especially the requirement that the dependent must have a job offer when he/she applies for employment authorization. They expressed concern that these perceived changes would lengthen the adjudicative time.

**Response:** The requirements in question under these regulations, including the requirement for a job offer, have been carried forward from the prior regulations. The individual prerequisites, which appeared in a lengthy, undifferentiated paragraph in prior regulations, have been set out in discrete paragraphs. New procedures have been jointly developed so that the Department of State and the Service comply with the provisions of IRCA, especially in the issuance of uniform employment authorization documentation. The Service will adjudicate dependent employment authorization expeditiously.

(6) **Comment:** Two parties expressed concern that denials would not be in writing.

**Response:** The Service will continue to issue written denials.

(7) **Comment:** Two parties stated that G-4s are different from A-1s, A-2s, and G-1s because their loyalties are to their employing international organizations and not to their countries, and because of the length of their assignments. One of the parties stated that G-4s are more like U.S. citizens in similar employment than other diplomatic/international organization personnel.

**Response:** The argument that G-4s are more loyal to their employing organizations than to their home countries is conjecture and does not lead to the conclusion that their dependents have the right to employment in the host country. Arguments that the Service should differentiate G-4s from A-1, A-2, and G-1 aliens because G-4s are \*\*\* indistinguishable from United States citizens similarly employed" are not persuasive. They overlook the fact that some A-1, A-2, and G-1 aliens are posted to the United States for lengthy periods of time; in fact, some current diplomatic officials have been posted to duty in the United States for more than 15 years. The arguments also overlook the fact that G-4s are accorded preferential immigration inspection when they enter the United States as are A-1, A-2, and G-1 aliens. Furthermore, G-4 principal aliens have no federal income tax liability and many are free of state and local tax liabilities as well. For 10 years the regulations governing G-4 dependent employment authorization paralleled the regulations for A-1 and A-2 dependent employment.

authorization under de facto arrangements. That policy has been carried forward into the current regulations.

(8) **Comment:** A few parties stated that the regulations would split G-4 families.

**Response:** The Service disagrees with this claim. The preamble and the regulations themselves state that the definition of "dependent" is for employment authorization purposes only. The preamble elaborates that the definition does not apply to matters of visa issuance. The regulations do not split families. An unmarried son or daughter may elect to retain G-4 status or may elect to change his/her nonimmigrant status or to pursue permanent residency.

(9) **Comment:** One party stated that regulating employment of dependents of its employees was a violation of legal conventions and effectively a restriction on the entry of its personnel. The party also claimed dependent employment is a right—that G-2 and G-3 dependents should be granted employment authorization and that the regulations jeopardize employment authorization for spouses.

**Response:** The Department of State has advised the Service that the United States does not have any international legal obligation with regard to the employment of dependents of representatives to or officials of international organizations. In the absence of such an obligation, the United States is free, pursuant to its domestic law and procedures, to determine the conditions under which these aliens in the United States may undertake employment in the private labor market. No cogent arguments were advanced why the dependents of G-2s (who are on temporary assignments of six months or less) should be eligible for employment authorization. The regulations make generous provision for employment authorization for spouses. Based on a recent determination by the Department of State's Accreditation Review Panel that G-3 was the most appropriate classification for representatives of the European Economic Community to the United Nations, the Service has extended eligibility to apply for employment authorization to dependents of certain G-3s.

This rule differs from the preceding interim rule in four ways:

(1) Eligibility to apply for employment authorization has been extended to dependents of certain principal aliens classified as G-3s;

(2) The procedures in § 214.2(a) (5) and (6) and § 214.2(g) (5) and (6) have

been restructured. The new process is flexible enough for the procedure of endorsing the dependent's I-94 and for the newly established procedure of issuing an employment authorization document which includes the dependent's photograph;

(3) The maximum validity for a grant has been extended from two years to three years in § 214.2(a)(7) and § 214.2(g)(7). The three-year period coincides with the Department of State's finding of the average length of time As and Gs are assigned to duty in the United States; and

(4) Based upon consultations with the Internal Revenue Service and the Department of Labor, the reporting requirements in § 214.2(a)(7) and § 214.2(g)(7) have been eliminated.

In accordance with 5 U.S.C. 605(b), the Commissioner certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule is not a major rule within the definition of section 1(b) of E.O. 12291, nor does this rule have federalism implications warranting the preparation of a Federal Assessment in accordance with E.O. 12612.

The information collection requirements contained in this regulation have been cleared by the Office of Budget and Management (OMB) under provisions of the Paperwork Reduction Act. The Office of Budget and Management control numbers for these collections are contained in 8 CFR 299.5.

#### List of Subjects in 8 CFR Part 214 and 274a

Administrative practices and procedure, Aliens, Employment.

The interim rule published at 53 FR 46850-46855 on November 21, 1988 is adopted as final with the following changes:

Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

#### PART 214—NONIMMIGRANT CLASSES

1. The authority citation for part 214 is revised to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1184, 1186a, 1187, and 8 CFR part 2.

2. In § 214.2, paragraphs (a) (5) through (7) and (g) (2), (3), (5), (6), (7), (9), and (11) are revised to read as follows:

**§ 214.2 Special requirements for admission, extension, and maintenance of status.**

\* \* \* \* \*

(a) \* \* \*

(5) *Dependent employment pursuant to formal bilateral employment agreements and informal de facto reciprocal arrangements.* (i) The Office of Protocol shall maintain a listing of foreign states which have entered into formal bilateral employment agreements. Dependents of an A-1 or A-2 principal alien assigned to official duty in the United States may accept or continue in unrestricted employment based on such formal bilateral agreements upon favorable recommendation by the Department of State and issuance of employment authorization documentation by the Service in accordance with 8 CFR part 274a. The application procedures are set forth in paragraph (a)(6) of this section. (ii) For purposes of this section, an informal de facto reciprocal arrangement exists when the Department of State determines that a foreign state allows appropriate employment on the local economy for dependents of certain United States officials assigned to duty in that foreign state. The Office of Protocol shall maintain a listing of countries with which such reciprocity exists. Dependents of an A-1 or A-2 principal alien assigned to official duty in the United States may be authorized to accept or continue in employment based upon informal de facto arrangements upon favorable recommendation by the Department of State and issuance of employment authorization by the Service in accordance with 8 CFR part 274a. Additionally, the procedures set forth in paragraph (a)(6) of this section must be complied with, and the following conditions must be met:

(A) Both the principal alien and the dependent desiring employment are maintaining A-1 or A-2 status as appropriate;

(B) The principal's assignment in the United States is expected to last more than six months;

(C) Employment of a similar nature for dependents of United States Government officials assigned to official duty in the foreign state employing the principal alien is not prohibited by that foreign state's government;

(D) The proposed employment is not in an occupation listed in the Department of Labor Schedule B (20 CFR part 656), or otherwise determined by the Department of Labor to be one for which there is an oversupply of qualified U.S. workers in the area of proposed employment. This Schedule B restriction does not apply to a dependent son or daughter who is a full-time student if the employment is part-time, consisting of not more than 20 hours per week, and/or if it is temporary

employment of not more than 12 weeks during school holiday periods; and

(E) The proposed employment is not contrary to the interest of the United States. Employment contrary to the interest of the United States includes, but is not limited to, the employment of A-1 or A-2 dependents: who have criminal records; who have violated United States immigration laws or regulations, or visa laws or regulations; who have worked illegally in the United States; and/or who cannot establish that they have paid taxes and social security on income from current or previous United States employment.

(6) *Application procedures.* The following procedures are applicable to dependent employment applications under bilateral agreements and de facto arrangements:

(i) The dependent must submit a completed Form I-566 to the Department of State through the office, mission, or organization which employs his/her principal alien. A dependent applying under paragraph (a)(2)(iii) or (iv) of this section must submit a certified statement from the post-secondary educational institution confirming that he/she is pursuing studies on a full-time basis. A dependent applying under paragraph (a)(2)(v) of this section must submit medical certification regarding his/her condition. The certification should identify the dependent and the certifying physician and give the physician's phone number; identify the condition, describe the symptoms and provide a prognosis; and certify that the dependent is unable to maintain a home of his or her own. Additionally, a dependent applying under the terms of a de facto arrangement must attach a statement from the prospective employer which includes the dependent's name; a description of the position offered and the duties to be performed; the salary offered; and verification that the dependent possesses the qualifications for the position.

(ii) The Department of State reviews and verifies the information provided, makes its determination, and endorses the Form I-566.

(iii) If the Department of State's endorsement is favorable, the dependent may apply to the Service. A dependent whose principal alien is stationed at a post in Washington, DC, or New York City shall apply to the District Director, Washington, DC, or New York City, respectively. A dependent whose principal alien is stationed elsewhere shall apply to the District Director, Washington, DC, unless the Service, through the Department of State, directs the dependent to apply to the district

director having jurisdiction over his or her place of residence. Directors of the regional service centers may have concurrent adjudicative authority for applications filed within their respective regions. When applying to the Service, the dependent must present his or her Form I-566 with a favorable endorsement from the Department of State and any additional documentation as may be required by the Attorney General.

(7) *Period of time for which employment may be authorized.* If approved, an application to accept or continue employment under this section shall be granted in increments of not more than three years each.

\* \* \*

(g) \* \* \*

(2) *Definition of G-1, G-3, or G-4 dependent.* For purposes of employment in the United States, the term "dependent" of a G-1, G-3, or G-4 principal alien, as used in § 214.2(g), means any of the following immediate members of the family habitually residing in the same household as the principal alien who is an officer or employee assigned to a mission, to an international organization, or is employed by an international organization in the United States:

(i) Spouse;

(ii) Unmarried children under the age of 21;

(iii) Unmarried sons or daughters under the age of 23 who are in full-time attendance as students at post-secondary educational institutions;

(iv) Unmarried sons or daughters under the age of 25 who are in full-time attendance as students at post-secondary educational institutions if a formal bilateral employment agreement permitting their employment in the United States was signed prior to November 21, 1988, and such bilateral employment agreement does not specify 23 as the maximum age for employment of such sons and daughters. The Office of Protocol of the Department of State shall maintain a listing of foreign states which the United States has such bilateral employment agreements. The provisions of this paragraph apply only to G-1 and G-3 dependents under certain bilateral agreements and are not applicable to G-4 dependents; and

(v) Unmarried sons or daughters who are physically or mentally disabled to the extent that they cannot adequately care for themselves or cannot establish, maintain, or re-establish their own households. The Department of State or the Service may require certification(s) as it deems sufficient to document such mental or physical disability.

(3) *Applicability of a formal bilateral agreement or an informal de facto arrangement for G-1 and G-3 dependents.* The applicability of a formal bilateral agreement shall be based on the foreign state which employs the principal alien and not on the nationality of the principal alien or dependent. The applicability of an informal de facto arrangement shall be based on the foreign state which employs the principal alien, but under a de facto arrangement the principal alien also must be a national of the foreign state which employs him or her in the United States.

\* \* \* \*

(5) *G-1 and G-3 dependent employment pursuant to formal bilateral employment agreements and informal de facto reciprocal arrangements, and G-4 dependent employment.* (i) The Office of Protocol shall maintain a listing of foreign states which have entered into formal bilateral employment agreements. Dependents of a G-1 or G-3 principal alien assigned to official duty in the United States may accept or continue in unrestricted employment based on such formal bilateral agreements, if the applicable agreement includes persons in G-1 or G-3 visa status, upon favorable recommendation by the Department of State and issuance of employment authorization documentation by the Service in accordance with 8 CFR part 274a. The application procedures are set forth in paragraph (g)(6) of this section.

(ii) For purposes of this section, an informal de facto reciprocal arrangement exists when the Department of State determines that a foreign state allows appropriate employment on the local economy for dependents of certain United States officials assigned to duty in that foreign state. The Office of Protocol shall maintain a listing of countries with which such reciprocity exists. Dependents of a G-1 or G-3 principal alien assigned to official duty in the United States may be authorized to accept or continue in employment based upon informal de facto arrangements, and dependents of a G-4 principal alien assigned to official duty in the United States may be authorized to accept or continue in employment upon favorable recommendation by the Department of State and issuance of employment authorization by the Service in accordance with 8 CFR part 274a. Additionally, the procedures set forth in paragraph (g)(6) of this section must be complied with, and the following conditions must be met:

(A) Both the principal alien and the dependent desiring employment are maintaining G-1, G-3, or G-4 status as appropriate;

(B) The principal's assignment in the United States is expected to last more than six months;

(C) Employment of a similar nature for dependents of United States Government officials assigned to official duty in the foreign state employing the principal alien is not prohibited by that foreign government. The provisions of this paragraph apply only to G-1 and G-3 dependents;

(D) The proposed employment is not in an occupation listed in the Department of Labor Schedule B (20 CFR part 656), or otherwise determined by the Department of Labor to be one for which there is an oversupply of qualified U.S. workers in the area of proposed employment. This Schedule B restriction does not apply to a dependent son or daughter who is a full-time student if the employment is part-time, consisting of not more than 20 hours per week, and/or if it is temporary employment of not more than 12 weeks during school holiday periods; and

(E) The proposed employment is not contrary to the interest of the United States. Employment contrary to the interest of the United States includes, but is not limited to, the employment of G-1, G-3, or G-4 dependents: who have criminal records; who have violated United States immigration laws or regulations, or visa laws or regulations; who have worked illegally in the United States; and/or who cannot establish that they have paid taxes and social security on income from current or previous United States employment. Additionally, the Department of State may determine a G-4 dependent's employment is contrary to the interest of the United States when the principal alien's country of nationality has one or more components of an international organization or international organizations within its borders and does not allow the employment of dependents of United States citizens employed by such component(s) or organization(s).

(6) *Application procedures.* The following procedures are applicable to G-1 and G-3 dependent employment applications under bilateral agreements and de facto arrangements, as well as to G-4 dependent employment applications:

(i) The dependent must submit a completed Form I-566 to the Department of State through the office, mission, or organization which employs his or her principal alien. If the principal is

assigned to or employed by the United Nations, the Form I-566 must be submitted to the U.S. Mission to the United Nations. All other applications must be submitted to the Office of Protocol of the Department of State. A dependent applying under paragraph (g)(2)(iii) or (iv) of this section must submit a certified statement from the post-secondary educational institution confirming that he or she is pursuing studies on a full-time basis. A dependent applying under paragraph (g)(2)(v) of this section must submit medical certification regarding his or her condition. The certification should identify the dependent and the certifying physician and give the physician's phone number; identify the condition, describe the symptoms and provide a prognosis; certify that the dependent is unable to establish, re-establish, and maintain a home or his or her own. Additionally, a G-1 or G-3 dependent applying under the terms of a de facto arrangement or a G-4 dependent must attach a statement from the prospective employer which includes the dependent's name; a description of the position offered and the duties to be performed; the salary offered; and verification that the dependent possesses the qualifications for the position.

(ii) The Department of State reviews and verifies the information provided, makes its determination, and endorses the Form I-566.

(iii) If the Department of State's endorsement is favorable, the dependent may apply to the Service. A dependent whose principal alien is stationed at a post in Washington, DC, or New York City shall apply to the District Director, Washington, DC, or New York City, respectively. A dependent whose principal alien is stationed elsewhere shall apply to the District Director, Washington, DC, unless the Service, through the Department of State, directs the dependent to apply to the district director having jurisdiction over his or her place of residence. Directors of the regional service centers may have concurrent adjudicative authority for applications filed within their respective regions. When applying to the Service, the dependent must present his or her Form I-566 with a favorable endorsement from the Department of State and any additional documentation as may be required by the Attorney General.

(7) *Period of time for which employment may be authorized.* If approved, an application to accept or continue employment under this section

shall be granted in increments of not more than three years each.

(9) *Dependents or family members of principal aliens classified G-2 or G-5.* A dependent or family member of a principal alien classified G-2 or G-5 may not be employed in the United States under this section.

(11) *Special provision.* As of February 16, 1990 no new employment authorization will be granted and no pre-existing employment authorization will be extended for a G-1 dependent absent an appropriate bilateral agreement or de facto arrangement. However, a G-1 dependent who has been granted employment authorization by the Department of State prior to the effective date of this section and who meets the definition of dependent under § 214.2(g)(2) (i), (ii), (iii) or (v) of this part but is not covered by the terms of a bilateral agreement or de facto arrangement may be allowed to continue in employment until whichever of the following occurs first:

- (i) The employment authorization by the Department of State expires; or
- (ii) He or she no longer qualifies as a dependent as that term is defined in this section; or
- (iii) March 19, 1990.

#### PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

3. The authority citation for part 274a is revised to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1324a, and 8 CFR part 2.

4. In § 274a.12, paragraph (c)(4) is revised to read as follows:

##### § 274a.12 Classes of aliens authorized to accept employment.

(c) \*

(4) An alien spouse or unmarried dependent child, son or daughter of an officer of, representative to, or employee of an international organization (G-1, G-3 or G-4) pursuant to § 214.2(g) of this chapter.

Dated: January 17, 1990.

Richard E. Norton,

Associate Commissioner, Examinations, Immigration and Naturalization Service.

[FR Doc. 90-3657 Filed 2-15-90; 8:45 am]

BILLING CODE 4410-10-M

#### DEPARTMENT OF AGRICULTURE

##### Animal and Plant Health Inspection Service

##### 9 CFR Parts 71 and 82

[Docket No. 88-161]

##### Poultry Affected by *Salmonella Enteritidis*

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Interim rule and request for comments.

**SUMMARY:** We are amending our regulations concerning avian and poultry diseases by declaring poultry disease caused by *Salmonella enteritidis* serotype *enteritidis* (SE) to be a communicable disease of poultry in the United States. We are adding restrictions on the interstate movement of chickens, eggs, and associated articles from egg production flocks that have been tested for SE and classified as Test Flocks based on positive environmental samples or classified as Infected Flocks based on recovery of SE from internal organs of flock chickens. We are also adding testing requirements for egg production flocks that are identified as possibly being infected with SE, to determine whether the flocks are infected. To control the spread of SE in breeding flocks, and to allow us to trace and control its spread from breeding flocks to egg production flocks, we are also adding requirements regarding egg-type chicken breeding flocks. Such flocks must be classified "U.S. Sanitation Monitored" under the National Poultry Improvement Plan, or meet a State plan determined by the Administrator to be equivalent, in order for the hatching eggs and newly-hatched chicks from the flocks to be moved interstate. These actions are considered necessary to prevent the spread of disease caused by SE in poultry flocks in the United States.

**DATES:** Interim rule effective February 16, 1990. Consideration will be given only to comments received on or before April 17, 1990.

**ADDRESSES:** To help ensure that your written comments are considered, send an original and three copies to Chief, Regulatory Analysis and Development, PPD, APHIS, USDA, Room 866, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782. Please state that your comments refer to Docket Number 88-161. Comments received may be inspected at USDA, Room 1141, South Building, 14th and Independence Avenue SW., Washington, DC, between

8 a.m. and 4:30 p.m., Monday through Friday, except holidays.

##### FOR FURTHER INFORMATION CONTACT:

Dr. I.L. Peterson, Staff Veterinarian, Sheep, Goat, Equine, and Poultry Diseases Staff, VS, APHIS, USDA, Room 771, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301-436-5777.

**SUPPLEMENTARY INFORMATION:** The bacterium known as *Salmonella enteritidis* serotype *enteritidis* (referred to below as SE) is associated with clinical disease problems in poultry, and is known to occur in poultry in the United States. In recent years this bacterium has been isolated from egg-type chicken breeding flocks and egg production flocks. Recent scientific evidence has shown vertical passage of SE from hens to chicks, and suggests that SE may be passed along to eggs before shell formation occurs if the laying hen is infected systemically with SE bacteria.

In addition to this vertical mode of transmission, SE can be spread horizontally among poultry through direct contact and through contact with articles associated with infected poultry, such as feed, pens, and litter.

SE is a serious poultry disease and public health concern that shows no sign of abatement, but instead appears to be increasing. During the past three years, SE has infected a number of domestic commercial egg-laying chicken flocks, causing morbidity and decreased production, and has also contaminated a quantity of commercial table eggs, causing a growing number of cases of human illness and death.

The domestic egg industry is organized in a pyramidal structure, with primary breeder and multiplier flocks, which number approximately 900, at the top of the pyramid. The primary breeder and multiplier flocks then supply offspring to form the base of the pyramid which consists of approximately 3,500 commercial laying flocks. The National Poultry Improvement Plan (NPIP), an industry supported national system with oversight by the Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture (USDA), was amended in 1989 to require SE testing in participating primary breeding and multiplier flocks (see Docket No. 89-049, 54 FR 23953-23958, June 5, 1989). The basis for these amendments was the recommendations of the voting delegates to the biennial conference of the NPIP held in June of 1988.

There is also concern that the Voluntary Model State Program adopted by a USDA/Food and Drug Administration task force has not been completely implemented, and may lack standardization, proper reporting, and shared information. The result is an increase in the magnitude of the SE problem. Intensified Federal efforts are necessary at this time to enable containment of SE and to control the spread of SE in egg-type breeding and production flocks. If not controlled, SE will continue to spread and will cause adverse economic impact on the table egg industry by lowering productivity and decreasing demand for eggs due to lack of consumer confidence that eggs are a safe food. Increases in SE in egg producing flocks would also increase the risk of SE spreading to broiler and turkey flocks, threatening even larger segments of the poultry industry.

To control these risks, we are adding two sets of regulatory requirements; one to address the spread of SE in primary and multiplier breeding flocks, and one to address the spread of SE in egg production flocks.

First, we are requiring that all hatching eggs and newly-hatched chicks from egg-type chicken flocks moved interstate must be classified "U.S. Sanitation Monitored" under the NPIP, or meet the requirements of a State classification plan determined by the Administrator to be equivalent to the "U.S. Sanitation Monitored" program under the NPIP. Such flocks, which are called "Certified *Salmonella enteritidis* serotype *enteritidis* Tested Free Flocks" for the purpose of this regulation, may move hatching eggs and newly-hatched chicks interstate without further restriction under the regulation. Making this plan mandatory should ensure that the spread of SE associated with breeding flocks will not occur, because flocks must follow testing, sanitation, and flock management techniques designed to exclude SE to qualify for classification under the NPIP or a State program determined to be equivalent by the Administrator.

Second we will identify egg production flocks to be studied for possible infection with SE, using reports of clinical signs of disease in these flocks and reports implicating particular egg production flocks as the probable source of outbreaks of SE in poultry or humans. These "Study Flocks" must undergo testing of environmental samples from chickens in the flocks for evidence of SE. Study Flocks with positive environmental samples will be identified as "Test Flocks," and we will restrict the interstate movement of

chickens, eggs, and other articles from these flocks. These Test Flocks must be tested for SE through blood tests and culture of internal organs, and those flocks found to be infected will continue to be subject to interstate movement restrictions. This change should reduce the interstate spread of SE in egg production flocks.

#### **Salmonella Infections in Humans**

APHIS has legislative authorities to control the spread of communicable diseases of livestock and poultry, and the primary purpose of the regulations being issued is to control the spread of SE as an agent of a communicable poultry disease of economic significance. However, the regulations also serve an important goal in reducing the number of SE outbreaks in humans, a serious public health problem that has recently been receiving attention from a variety of Federal and State agencies.

The World Health Organization has characterized SE as an international epidemic of grave consequences. In the United States, the problem is spreading out of Northeastern States into a much wider geographical area. According to reports from the Centers for Disease Control (CDC), SE has been identified as the cause of numerous cases of human disease in persons who have eaten eggs contaminated with it. CDC has reported a six-fold increase in cases of SE infections in humans during the period 1976 to 1986, with over 150 confirmed domestic outbreaks in humans over the last 3 years. The increase is predominantly associated with consumption of Grade A shell eggs, especially in foods containing raw or improperly prepared eggs.

Responsibility for regulating food safety issues associated with SE contamination of eggs is distributed among several Federal agencies. APHIS is responsible for preventing the spread of communicable diseases of poultry such as SE in order to protect the livestock and poultry of the United States. The Agricultural Marketing Service (AMS) has authority for certain aspects of egg product safety, including pasteurization and other processing activities. The Food and Drug Administration (FDA) of the Department of Health and Human Services is responsible for preventing the spread of communicable diseases that are a threat to humans and otherwise ensuring the safety of the human food supply. The FDA, as part of the overall program for the control of *Salmonella enteritidis*, has indicated that it intends to develop regulations to assure the safety of table eggs in interstate commerce.

Implementation of these regulations

would be contingent upon an evaluation by several Federal Agencies of the effectiveness of the USDA testing program. FDA also intends to promulgate new regulations and to develop new advisory policies concerning table egg-handling procedures. USDA supports these initiatives.

This regulation addresses outbreaks of SE infection in humans primarily as an indicator of which egg production flocks may be infected with SE. Flocks that are implicated as the probable source of an outbreak of SE in humans will be classified as Study Flocks under the regulations, and will be subject to testing requirements and restrictions that address SE as a poultry disease.

#### **Interagency Coordination and Reporting**

The issues associated with SE in egg production flocks, and human disease outbreaks caused by SE, require substantial coordination and information sharing between involved Federal agencies, State health and agricultural agencies, and industry members. APHIS is currently examining ways to enhance the flow of information between these participants, particularly in the areas of accurate and comprehensive reporting of outbreaks of SE in poultry flocks, reporting of test results for flocks tested for SE, and tracing of shipments of poultry and poultry products in commerce.

#### **Declaring Poultry Disease Caused by *Salmonella Enteritidis* an Endemic Disease**

Paragraph (a) of 9 CFR 71.3 lists certain animal or poultry diseases which are endemic to the United States, and states that animals or poultry affected with any of these diseases shall not be moved interstate. However, § 71.3(d) partially removes this prohibition for certain types of movements, including a provision in paragraph (d)(6) that the Deputy Administrator, Veterinary Services, may provide for the movement of animals affected with any of the listed diseases under such conditions as he may prescribe to prevent the spread of disease.

We are adding to the list of endemic diseases in § 71.3(a) "poultry disease caused by *Salmonella enteritidis* serotype *enteritidis*." This addition means that poultry and poultry products contaminated with this type of disease may not be moved interstate, except under conditions prescribed by the Deputy Administrator in accordance with § 71.3(d)(6). We are adding such conditions to 9 CFR part 82, discussed below.

### Restrictions on Interstate Movement of Egg-Type Poultry and Poultry Products

We are adding to 9 CFR part 82 a new subpart B, "Poultry Disease Caused by *Salmonella enteritidis* serotype *enteritidis*." The requirements of this new subpart are discussed below.

#### Section 82.30 Definitions

We are adding definitions of the following terms used in the regulations: Administrator, Animal and Plant Health Inspection Service, Authorized laboratory, Certified *Salmonella enteritidis* serotype *enteritidis* Tested Free Flocks, Egg production flock, Federal representative, Flock, Hatching eggs, Infected flock, Internal organs, Interstate, Move, Multiplier breeding flock, Newly-hatched chicks, Primary breeding flock, State, State representative, Study flock, and Test flock.

#### Section 82.31 Applicability

The regulations in this subpart apply only to primary and multiplier breeding flocks used for the purpose of producing progeny for commercial egg production, and to egg production flocks used for the purpose of producing table eggs for sale or other distribution in interstate commerce. We are not including other types of flocks (e.g., broiler breeding and production flocks, unless the flocks also meet the regulations' definition of egg production flocks) in the scope of this regulation, because we are not at this time attempting to eradicate SE throughout the poultry industry, but rather are focusing our resources on controlling the spread of SE in the segments of the poultry industry where the spread of SE is most prevalent, i.e., egg-type flocks.

#### Section 82.32 Determination That Egg Production Flocks Are Study Flocks, Test Flocks, or Flocks Infected With *Salmonella Enteritidis* Serotype *Enteritidis*

The section describes how a Federal or State representative will determine the status of an egg production flock. Study Flocks are flocks which a Federal representative or State representative has determined through epidemiologic investigation to be the probable source of disease in an outbreak of disease in poultry or humans caused by SE. Test Flocks are Study Flocks that have had environmental samples collected as described in this section and have shown positive test results for SE in one or more of the samples. Infected Flocks are flocks that have undergone a comprehensive testing program for SE based on culture of internal organs,

described in this section, and have been found positive for SE.

Federal and State representatives will determine an egg production flock to be a Study Flock if epidemiologic investigation indicates that the flock is the probable source of disease in an outbreak of disease caused by SE in poultry flocks or in humans, or if the flock has received progeny from a primary breeding flock or multiplier breeding flock that has had environmental samples positive for SE recovered through testing done in accordance with the NPIP or a State plan determined to be equivalent by the Administrator. An egg production flock would be determined to be a Study Flock if it has received progeny from a primary breeding or multiplier flock since the last negative environmental sample before the positive sample for SE. This is because the primary breeding or multiplier flock could have become infected with SE, and could have disseminated SE through its progeny, at any time after the last negative sample prior to the positive sample.

The intent is to "trace back" poultry and human SE outbreaks to the flock that was the source of the disease organism, and to "trace forward" the possible dissemination of SE from those flocks to other flocks receiving poultry or poultry products from Study Flocks. Evidence used in the epidemiologic investigation would include epidemiological reports from Federal or State health agencies, and records of the shipment of poultry and poultry products to and from the flock that can be used to trace the possible dissemination of SE. Based on these materials, the Federal or State representative could determine if there is reason to study a flock to see if it may be infected with SE. We are requiring the person in control of a Study Flock, Test Flock, or Infected Flock, upon request of a Federal representative or State representative, to make available for review and copying all records of the shipment of poultry and poultry products to and from the flock. In accordance with § 82.36, persons who do not comply with this request are subject to denial or withdrawal of permits to ship articles interstate.

The testing procedures for SE rely on recovery of SE from the internal organs of a chicken as the only conclusive proof that the chicken is infected with SE. Recovery of SE from other materials associated with the flock, such as manure and egg transport machinery, indicate a probability that the flock is infected with SE, and Study Flocks for which these samples test positive will

become Test Flocks and will have the internal organs of a sample of chickens tested. Tests required by the regulations will be performed at authorized laboratories. An authorized laboratory is one which the Administrator, after consulting with the State animal health official in the State in which the laboratory is located, has determined: (1) Has technical personnel assigned to conduct the tests who have received training prescribed by the National Veterinary Services Laboratories; (2) uses reagents, media, and antigen approved by the National Veterinary Services Laboratories; (3) follows standard test protocols approved by the National Veterinary Services Laboratories; (4) meets check test proficiency requirements prescribed by the National Veterinary Services Laboratories; and (5) reports all test results to the State animal health official and APHIS.<sup>1</sup>

Manure samples and egg transport machinery samples will be collected from each row of cages in each house of the Study Flock, and will be cultured for SE, using standard microbiological procedures for the isolation and identification of *Salmonella*-type organisms. If SE is recovered from any manure or egg transport machinery samples, that Study Flock will be classified as a Test Flock and will be required to undergo internal organ testing.

Also, a Federal or State representative will determine any egg production flock to be a Test Flock if the representative determines through epidemiologic investigation that the flock is the probable source of disease in three or more outbreaks of disease in humans caused by SE. In cases where a flock has been associated with three or more human disease outbreaks, we believe the level of evidence that the flock is probably infected with SE is sufficient to justify foregoing the Study Flock stage for that flock. This provision will also serve to prevent interstate infection of other flocks and further interstate human disease outbreaks caused by that flock, since restrictions on interstate movements of poultry products apply to Test Flocks.

<sup>1</sup> Training requirements, standard test protocols, and check test proficiency requirements prescribed by the National Veterinary Services Laboratories and the names and addresses of authorized laboratories can be obtained by writing to the Administrator, c/o Sheep, Goat, Equine, and Poultry Diseases Staff, Veterinary Services, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782.

After a flock is determined to be a Test Flock, blood samples will be taken from 300 birds distributed randomly in the Test Flock (or 300 birds from each house, if the flock occupies more than one house). The blood samples will be tested using a stained-antigen, rapid, whole blood test (this same test is currently used to test flocks participating in the NPIP).

Following the collection of blood samples from the Test Flock, chickens will be selected for internal organ samples. In the course of selecting the internal organ sample for Test Flocks, chickens will be selected from the rows that were the source of the positive environmental or blood samples and included in the group for internal organ culture. The total number of chickens from each house to be sacrificed for internal organ culture will be 60, including all blood test reactors (if any) and enough chickens selected from rows with positive manure or egg transport machinery samples (if any) to bring the total to 60.

We believe that a blood sample size of 300 and an internal organ sample size of 60 will reliably indicate whether an egg production flock is infected with SE, because commonly accepted epidemiological methods indicate that these sample sizes will reliably reveal SE infection at a 5 percent level with a 95 percent confidence rate.

Test Flocks will remain in this category until they have undergone internal organ testing in accordance with this section and are determined either to test negative for SE, or to be Infected Flocks. Flocks determined to be infected will be so considered until egg transport machinery samples, manure samples, and internal organ samples from the flock are retested in accordance with this section with no recovery of SE.

This section also requires the Federal or State representative who determines an egg production flock to be a Study Flock, a Test Flock, or an Infected Flock to notify in writing the person in control of the flock of the determination. In the event that an Infected Flock is later retested and completes egg transport machinery, manure, and internal organ testing with negative results, a Federal or State representative shall determine that the flock is no longer an Infected Flock, and shall notify in writing the person in control of the flock of that determination.

We are requiring cleaning and disinfection of premises if a flock owner decides to depopulate an Infected Flock and replace it with new chickens in the same premises that housed the Infected Flock, to prevent the transmission of SE

to the new chickens through environmental contamination. A replacement flock that is moved into the same premises that housed an Infected Flock that was depopulated will be determined to be an Infected Flock, unless a Federal or State representative determines that the houses are cleaned and disinfected as follows between the time the infected flock is depopulated and the time the new flock arrives at the premises: all manure and litter must be removed from the house to an isolated area where there is no opportunity for dissemination of disease organisms; the walls, floors, and equipment in the house must be scrubbed with hot, soapy water and rinsed; and the walls, floors, and equipment in the house must be sprayed with a disinfectant which is registered by the U.S. Environmental Protection Agency as germicidal, in accordance with the approved label.

We are requiring cleaning and disinfection of the houses of Infected Flocks before they are used to house replacement flocks because the replacement chickens could become infected by SE organisms shed into the house environment by the Infected Flock formerly housed there, and cleaning and disinfection of the houses will control the possibility of infection of the replacement flock.

#### *Section 82.33 Interstate Movement of Articles From Test Flocks and Infected Flocks*

This section describes interstate movement restrictions for articles from Study Flocks, Test Flocks designated for internal organ testing, and Infected Flock. No interstate movement restrictions will be applied to Study Flocks, unless the person in control of the flock either refuses to allow collection of environmental samples to begin within 48 hours after the person in control of the flock is notified in writing of Study Flock status, or prevents completion of collection of the samples within 15 days after the person in control of the flock was notified in writing that his flock was determined to be a Study Flock. If the person in control of the flock refuses to allow sample collection within this time period, the Study Flock will be reclassified as a Test Flock, and the interstate movement restrictions applicable to the new classification will be imposed.

Identical interstate movement restrictions will be imposed for Infected Flocks and Test Flocks. Articles subject to restriction include live chickens, eggs, manure, cages, coops, containers, troughs, and other equipment. Some of these articles are prohibited movement,

and some are allowed movement under a permit and special conditions.

Eggs could be moved interstate from Infected Flocks and Test Flocks only for pasteurization, because pasteurization would destroy the infectivity of any SE within the eggs. The eggs could be moved interstate only in a vehicle sealed by a Federal or State representative.

Live chickens could be moved interstate from Infected Flocks and Test Flocks only for slaughter within 24 hours of arrival at a federally inspected slaughtering establishment. This type of establishment maintains operating procedures designed to prevent the spread of communicable diseases to other flocks.

Equipment such as cages, coops, containers, and troughs could be moved interstate from Infected Flocks and Test Flocks only if the equipment is made of hard plastic or metal (which can endure the necessary cleaning and disinfection), and the equipment was cleaned and disinfected in the presence of a Federal or State representative. Cleaning and disinfection would prevent the possible spread of SE through movement of the equipment.

Manure could be moved interstate from Infected Flocks and Test Flocks only if moved in covered containers filled inside the poultry house generating the manure, to prevent spillage. Also, the wheels and exposed surfaces of the vehicle moving the manure must be free of manure, and the manure must be moved for a use that does not present a risk of spreading infection, i.e., burial, turning under on fields not used for grazing or poultry production, or composting in a covered compost heap.

#### *Section 82.34 Interstate Movement of Hatching Eggs and Newly-Hatched Chicks*

This section prohibits the interstate movement of hatching eggs or newly-hatched chicks from any egg-type breeding flock, unless they are classified "U.S. Sanitation Monitored" under the National Poultry Improvement Plan (NPIP) in accordance with 9 CFR 145.23(d), or meet the requirements of a State poultry plan that has been determined by the Administrator to be equivalent to the NPIP in accordance with 9 CFR part 145. Such flocks are called "Certified *Salmonella enteritidis* serotype *enteritidis* Tested Free Flocks" for the purpose of this regulation.

The U.S. Sanitation Monitored program was established as a voluntary *Salmonella* control program through which participating members of the breeding and hatching industry act to

reduce the incidence of *Salmonella* organisms in hatching eggs and chicks by following effective sanitation procedures at breeder farms and hatcheries. We believe that requiring "U.S. Sanitation Monitored" or an equivalent State classification for hatching eggs or newly-hatched chicks from any egg-type breeding flock will greatly reduce the spread of *Salmonella* in poultry flocks. In addition, this requirement will allow us to identify infected breeding flocks and trace forward the possible spread of *Salmonella* from these flocks to other breeding or egg production flocks receiving hatching eggs or newly-hatched chicks from infected breeding flocks.

#### Section 82.35 Issuance of Permits

A permit must be obtained from a Federal representative to move restricted items interstate in order to prevent the movement of poultry or articles that could spread SE. Another reason for the permit requirement is to provide information for our files showing when, where, and what restricted items are being moved interstate. This information is important in helping us trace disease outbreaks to their source and enforce the regulations.

#### Section 82.36 Denial and Withdrawal of Permits

If a Federal representative determines that a permit applicant or the holder of a permit is violating either the regulations or a condition specified in a permit, he or she may deny or withdraw the permit by notifying the applicant or holder of its denial or withdrawal, orally or in writing. If the notice was oral, a written notice of the denial or withdrawal, explaining why the permit was denied or withdrawn, will follow.

Within 10 days after receiving the written notice of denial or withdrawal, a permit holder or applicant may appeal the decision by writing to the Administrator and requesting a hearing with respect to the merits or validity of the denial or withdrawal. In the letter of appeal, the permit holder or applicant must describe the material facts that are in dispute. A hearing will be held in accordance with rules of practice which shall be adopted by the Administrator for the proceeding; however, the withdrawal or denial shall continue in effect pending the completion of the proceeding, and any judicial review thereof, unless otherwise ordered by the Administrator.

#### Emergency Action

James W. Glossner, Administrator of the Animal and Plant Health Inspection

Service, has determined that there is good cause for publishing this rule without prior opportunity for public comment.

SE is a present and expanding cause of economic concern for the United States egg-type chicken industry, and has also recently emerged as a serious public health concern. Immediate action is necessary to prevent harm to the egg-type chicken industry and the public.

Strains of SE are endemic in egg producing and egg-type breeding flocks in northeastern and mid-Atlantic States. In addition, SE-infected flocks are present and expanding in midwestern and northwestern States. The economic impact of SE infection is now largely confined to egg-type chicken flocks, but broiler and turkey flocks could also suffer economic losses if SE is not successfully controlled in egg-type flocks and widespread SE infection spreads to these other segments of the poultry industry.

Losses due to SE currently represent a serious adverse economic effect, particularly to the \$3.2 billion egg industry. SE can cause clinical disease in chickens and lower productivity, and also can lead to reduced demand for eggs and egg products, caused by public concerns about egg safety.

Since prior notice and other public procedures with respect to this interim rule are impracticable and contrary to the public interest under these conditions, there is good cause under 5 U.S.C. 553 for making it effective upon publication in the *Federal Register*. We will consider comments that are received within 60 days of publication of this interim rule in the *Federal Register*. After the comment period closes, we will publish another document in the *Federal Register*, including discussion of any comments we receive and any amendments we are making to the rule as a result of the comments. Executive Order 12291 and Regulatory Flexibility Act.

We are issuing this rule in conformance with Executive Order 12291, and we have determined that it is not a "major rule." Based on information compiled by the Department, we have determined that this rule will have an effect on the economy of less than \$100 million; will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and will not cause a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-

based enterprises in domestic or export markets.

In accordance with 5 U.S.C. 603, we have performed an Initial Regulatory Flexibility Analysis regarding the impact of this interim rule on small entities.

In accordance with 21 U.S.C. 111, 134a, and 134f, the Secretary of Agriculture is authorized to promulgate regulations to prevent the dissemination of contagious, infectious, or communicable diseases of poultry from one State to another.

As alternatives to the provisions of this rule, we have considered taking no action, and requiring mandatory testing for SE of all egg production flocks engaged in interstate commerce. The alternative of no action was rejected because it would not fulfill the APHIS mandate to prevent the dissemination of communicable poultry disease. Mandatory testing of all egg production flocks engaged in interstate commerce was rejected because the selected alternative addresses the same problems of SE dissemination that all-flock testing would address, but concentrates resources on two critical control points in the egg production chain by restricting the movement of hatching eggs and newly hatched chicks and testing and restricting egg production flocks that have been implicated in SE outbreaks in poultry or humans.

There are two provisions of this rule that may have significant economic impacts on small entities; the prohibition on interstate movement of hatching eggs and newly-hatched chicks unless they are classified "U.S. Sanitation Monitored" under the NPIP or meet a State plan determined to be equivalent by the Administrator (the Certified *Salmonella enteritidis* serotype *enteritidis* Tested Free Flocks), and the testing requirements and restrictions on interstate movements for egg production flocks identified as Test Flocks or Infected Flocks.

Breeders affected by the hatching eggs and newly-hatched chicks classification requirement fall into two groups; approximately 635 large commercial breeders of egg-type chickens engaged in interstate movements, and a larger number (estimated at several thousand) of smaller breeders, most of which are small entities, that may occasionally or frequently wish to sell hatching eggs and newly-hatched chicks interstate.

The 635 large commercial egg type breeders are currently participating in the U.S. Sanitation Monitored program of the NPIP at a rate very close to 100 percent, and these breeders should feel

little or no additional impact from the regulations, since they are already meeting its classification requirements by participating in this program of the NPIP.

Smaller breeders of egg-production chickens who wish to engage in interstate sales or other distribution of hatching of eggs and newly-hatched chicks will be required to participate in the U.S. Sanitation Monitored program of the NPIP or a State program determined to be equivalent by the Administrator, at an annual cost of approximately \$500 per chicken house maintained. In some cases, this testing cost could be partially or wholly subsidized by State governments or the Federal government.

Egg production flocks that are identified as Test Flocks or Infected Flocks will suffer economic impacts as a result of this rule, in the form of revenue loss due to the prohibition against interstate sale of their eggs (except for breaking and pasteurization) for the period they are considered to be Test Flocks or Infected Flocks. The total number of egg production flocks that will be identified as Test Flocks or Infected Flocks, and the number of these which are small entities, cannot be estimated until we acquire further data on the extent and rate of spread of SE in egg production flocks. In 1988, 40 egg production flocks were implicated, none of which were small entities. However, approximately 93 percent of egg production flocks are small entities (80,210 of 86,005 producers of poultry products for sale), and it is likely that some egg production flocks that are small entities will be implicated in the future. The revenue loss will depend on the length of time the flock is determined to be a Test Flock or an Infected Flock, the availability of intrastate markets for their eggs and interstate markets for pasteurized eggs, and other factors, none of which can currently be estimated with accuracy.

We do not currently have all the data necessary for a comprehensive analysis of the effects of this rule on small entities, and we invite comments on these impacts. In particular, we are seeking data in the following areas: (1) the total number and size of small entities engaged in interstate sales or other distribution of egg-type chicken hatching eggs and newly-hatched chicks; (2) the total number and size of small entities engaged in interstate distribution of table eggs; (3) availability and price data for intrastate markets for these products; (4) price data for interstate sales of eggs for breaking and pasteurization compared to interstate

sales of table eggs; and (5) the extent of State government subsidies of testing costs for flocks undergoing testing for *Salmonella* under the NPIP or a State program determined to be equivalent by the Administrator.

This rule may have a significant economic impact on a substantial number of small entities. If we determine that this is so, we will discuss the issues raised by section 604 of the Regulatory Flexibility Act in our Final Regulatory Flexibility Analysis.

#### **Executive Order 12372**

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. [See 7 CFR part 3015, subpart V.]

#### **Paperwork Reduction Act**

In accordance with section 3507 of the Paperwork Reduction Act of 1980 [44 U.S.C. 3507], the information collection provisions that are included in this interim rule have been submitted for approval to the Office of Management and Budget (OMB). Written comments concerning any information collection provisions should be submitted to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for APHIS, Washington, DC 20503. A duplicate copy of such comments should be submitted to Helene R. Wright, Chief, Regulatory Analysis and Development, PPD, APHIS, USDA, Room 866, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782.

#### **List of Subjects**

##### **9 CFR Part 71**

Animal diseases, Livestock and livestock products, Poultry and poultry products, Quarantine, Transportation.

#### **List of Subjects**

##### **9 CFR Part 82**

Animal diseases, Chlamydiosis, Exotic Newcastle disease, Ornithosis, Poultry and poultry products, Psittacosis, Quarantine, Transportation.

Accordingly, 9 CFR parts 71 and 82 are amended as follows:

#### **PART 71—GENERAL PROVISIONS**

1. The authority citation for part 71 continues to read as follows:

Authority: 21 U.S.C. 111–113, 114a, 114a–1, 115–117, 120–126, 134b, 134f; 7 CFR 2.17, 2.51, and 371.2(d).

#### **§ 71.3 [Amended]**

2. Paragraph (a) of § 71.3 is amended by adding the phrase "poultry disease caused by *Salmonella enteritidis* serotype *enteritidis*," immediately

following the phrase "psittacosis or ornithosis."

#### **PART 82—EXOTIC NEWCASTLE DISEASE IN ALL BIRDS AND POULTRY; PSITTACOSIS AND ORNITHOSIS IN POULTRY; POULTRY DISEASE CAUSED BY SALMONELLA ENTERITIDIS**

3. The authority citation for part 82 is revised to read as follows:

Authority: 21 U.S.C. 111–113, 115, 117, 120, 123–126, 134a, 134b, 134f; 7 CFR 2.17, 2.51, and 371.2(d).

4. The heading for part 82 is revised to read as set forth above, and a "Subpart A—Exotic Newcastle Disease, Psittacosis, and Ornithosis" is established to include §§ 82.1 through 82.6 currently contained in part 82.

#### **Subpart A—Exotic Newcastle Disease, Psittacosis, and Ornithosis**

##### **§ 82.1 [Amended]**

5. In the introductory text to § 82.1, the word "part" is removed and the word "subpart" is inserted in its place.

6. A new subpart B is added to part 82 to read as follows:

#### **Subpart B—Poultry Disease Caused by *Salmonella Enteritidis* Serotype *Enteritidis***

##### **Sec.**

82.30 Definitions.

82.31 Applicability.

82.32 Determination that egg production flocks are study flocks, test flocks, or flocks infected with *Salmonella enteritidis* serotype *enteritidis*.

82.33 Interstate movement of articles from study flocks, test flocks, and infected egg production flocks.

82.34 Interstate movement of hatching eggs and newly-hatched chicks.

82.35 Issuance of permits.

82.36 Denial and withdrawal of permits.

#### **Subpart B—Poultry Disease Caused by *Salmonella Enteritidis* Serotype *Enteritidis***

##### **§ 82.30 Definitions.**

As used in connection with this subpart, the following terms shall have the meaning set forth in this section.

**Administrator.** The Administrator of the Animal and Plant Health Inspection Service or any individual authorized to act for the Administrator.

**Animal and Plant Health Inspection Service (APHIS).** The Animal and Plant Health Inspection Service of the United States Department of Agriculture.

**Authorized laboratory.** A laboratory approved by the Administrator to conduct tests in accordance with this subpart. The Administrator will approve an authorized laboratory only after

consulting with the State animal health official in the State in which the laboratory is located and after determining that the laboratory:

(1) Has technical personnel assigned to conduct the tests who have received training prescribed by the National Veterinary Services Laboratories;

(2) Uses reagents, media, and antigen approved by the National Veterinary Services Laboratories;

(3) Follows standard test protocols approved by the National Veterinary Services Laboratories;

(4) Meets check test proficiency requirements prescribed by the National Veterinary Services Laboratories; and

(5) Reports all test results to the State animal health official and APHIS.<sup>1</sup>

*Certified Salmonella enteritidis serotype enteritidis Tested Free Flocks.* Egg-type chicken breeding flocks that are classified "U.S. Sanitation Monitored" under the National Poultry Improvement Plan (NPIP), or meet the requirements of a State classification plan determined by the Administrator to be equivalent to the NPIP, in accordance with § 145.23(d) of this chapter.

*Egg production flock.* A flock maintained for the purpose of producing eggs for human consumption.

*Federal representative.* An individual employed and authorized by the Federal government to perform the tasks required by this subpart.

*Flock.* All of the poultry on one premises, except that, at the discretion of a Federal representative, any group of poultry that is physically segregated from another group by barriers impervious to the spread of disease organisms and does not share common equipment or personnel with the other group may be considered as a separate flock.

*Hatching eggs.* Eggs in which young birds or poultry are allowed to develop.

*Infected flock.* A flock determined to be infected with *Salmonella enteritidis* serotype *enteritidis* in accordance with § 82.32(c) of this subpart.

*Internal organs.* All internal organs except for the lungs and organs of the gastrointestinal tract.

*Interstate.* From one State into or through any other State.

*Move (moving, moved, movement).* Shipped, offered for shipment to a

common carrier, received for transportation or transported by a common carrier, or carried, transported, moved, or allowed to be moved by any means.

*Multiplier breeding flock.* A flock that is intended for the production of hatching eggs used for the purpose of producing progeny for commercial egg production.

*Newly-hatched chicks.* Chicks that have not been fed or watered for the first time.

*Primary breeding flock.* A flock composed of one or more generations that is maintained for the purpose of establishing or continuing multiplier breeding flocks for the ultimate purpose of commercial egg production.

*State.* Any State, the District of Columbia, Puerto Rico, Guam, the Northern Mariana Islands, the Virgin Islands of the United States, and any other territory or possession of the United States.

*State representative.* An individual employed in animal health work and authorized by a State or political subdivision of a State to perform the tasks required by this subpart.

*Study flock.* A flock determined in accordance with § 82.32(a) of this part to be a study flock, based on (1) a determination by a Federal representative or State representative through epidemiologic investigation that the flock is the probable source of disease in an outbreak of disease in poultry or humans caused by *Salmonella enteritidis* serotype *enteritidis*, or (2) a determination by a Federal representative or State representative that the flock has received progeny from a primary breeding flock or multiplier breeding flock that has had a positive environmental sample in accordance with § 145.23(d)(1)(v) of this chapter, after the date of the last negative environmental sample for that primary breeding flock or multiplier breeding flock.

*Test flock.* A flock determined in accordance with § 82.32(b) of this part to have tested positive for *Salmonella enteritidis* serotype *enteritidis* in one or more manure or egg transport machinery sample, and designated for blood and internal organ testing in accordance with § 82.32(c) of this part.

#### § 82.31 Applicability.

The regulations in this subpart apply only to primary and multiplier breeding flocks used for the purpose of producing progeny for commercial egg production, and to egg production flocks used for the purpose of producing table eggs for sale or other distribution in interstate commerce.

#### § 82.32 Determination that egg production flocks are study flocks, test flocks, or flocks infected with *Salmonella enteritidis* serotype *enteritidis*.

Only a Federal representative or a State representative may make a determination in accordance with this subpart that an egg production flock is a study flock, a test flock, or a flock infected with *Salmonella enteritidis* serotype *enteritidis*. The Federal representative or State representative shall notify in writing the person in control of the flock that his or her flock has been determined to be a study flock, a test flock, or an infected flock immediately after such a determination is made. At any time after such notification, the person in control of a Study Flock, Test Flock, or Infected Flock, upon request of a Federal representative or State representative, shall make available for review and copying all records of the shipment of poultry and poultry products to and from the flock.

(a) *Study flocks.* An egg production flock shall be determined to be a study flock if (1) a Federal or State representative determines through epidemiologic investigation that the flock is the probable source of disease in an outbreak of disease in humans or poultry caused by *Salmonella enteritidis* serotype *enteritidis*, or (2) a Federal representative or State representative determines that the flock has received progeny from a primary breeding flock or multiplier breeding flock that has had a positive environmental sample in accordance with § 145.23(d)(1)(v) of this chapter after the date of the last negative environmental sample for that primary breeding flock or multiplier breeding flock.

(b) *Test flocks.* A study flock shall be determined to be a test flock if manure samples and egg transport machinery samples are collected and tested in accordance with this paragraph and one or more of the samples tests positive for *Salmonella enteritidis* serotype *enteritidis*; except that, a study flock shall be determined to be a test flock if the person in control of the flock has refused to allow collection of samples in accordance with § 82.32(b)(1) within 48 hours of the time the person in control of the flock was notified in writing by a Federal representative or State representative that his flock was determined to be a study flock, or if the actions of the person in control of the flock prevent completion of collection of samples in accordance with § 82.32(b)(1) within 15 days of the time the person in control of the flock was notified by a Federal representative or State

<sup>1</sup> Training requirements, standard test protocols, and check test proficiency requirements prescribed by the National Veterinary Services Laboratories and the names and addresses of authorized laboratories can be obtained by writing to the Administrator, c/o Sheep, Goat, Equine, and Poultry Diseases Staff, Veterinary Services, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782.

representative that his flock was determined to be a study flock. If a Federal or State representative determines through epidemiologic investigation that any flock is the probable source of disease in three or more outbreaks of disease in humans caused by *Salmonella enteritidis* serotype *enteritidis*, that flock shall be determined to be a test flock.

(1) *Sample collection.* A Federal representative or State representative shall initiate testing of each study flock by collecting the following samples for testing.

(i) *Manure samples.* The Federal representative or State representative shall collect one manure sample from each row of cages, using a sterile 4-inch by 4-inch gauze sponge for each sample. The manure sample shall be collected by wiping the manure scraper if a manure scraper is used on the row; otherwise, collect the manure sample by dragging the swab along the manure pile beneath the cages. The gauze sponge used to collect manure samples from each row shall be placed in an 18-ounce whirl-pak plastic bag containing double strength skim milk, and the bag shall be marked with the location of the row from which the sample is taken.

(ii) *Egg transport machinery samples.* The Federal representative or State representative shall collect one egg transport machinery sample from each row of cages by wiping the egg transport belt and egg escalator, using a sterile 4-inch by 4-inch gauze sponge for each sample. The gauze sponge used to collect egg transport machinery samples from each row shall be placed in an 18-ounce whirl-pak plastic bag containing double strength skim milk, and the bag shall be marked with the location of the row from which the sample is taken.

(c) *Infected flocks.* A flock shall be determined to be an infected flock if the flock is tested in accordance with this paragraph and *Salmonella enteritidis* serotype *enteritidis* is recovered from the internal organs of one or more chickens in the flock. If *Salmonella enteritidis* serotype *enteritidis* is recovered from any manure sample or egg transport machinery sample from a study flock, but not from internal organs, the flock shall be retested in accordance with this paragraph beginning not less than 15 days after the date the first internal organ samples are collected, and if *Salmonella enteritidis* serotype *enteritidis* is not recovered from the internal organs of one or more chickens in the flock during this second testing, the flock will be determined not to be a study flock, a test flock, or an infected flock. An infected flock shall be considered infected until the flock has

been retested in accordance with this paragraph without recovery of *Salmonella enteritidis* serotype *enteritidis* from any samples. If an infected flock is depopulated, and a new flock is brought into the house or houses that contained the infected flock, the new flock shall be determined to be an infected flock unless the houses are cleaned and disinfected as follows between the time the infected flock is depopulated and the time the new flock arrives at the premises: all manure and litter must be removed from the house to an isolated area where there is no opportunity for dissemination of disease organisms; the walls, floors, and equipment in the house must be scrubbed with hot, soapy water and rinsed; and the walls, floors, and equipment in the house must be sprayed with a disinfectant which is registered by the U.S. Environmental Protection Agency as germicidal, in accordance with the label directions.

(1) *Blood samples.* The Federal representative or State representative shall collect blood samples from 300 chickens distributed randomly in each house, and also collect blood samples from any chickens that show clinical signs of infection with *Salmonella enteritidis*. Blood samples shall be collected in accordance with the procedures in §§ 147.1(a) and 147.3 of this chapter. The Federal or State representative shall band each chicken tested with a band bearing a unique number identifying the tube containing the blood sample from that chicken.

(2) *Internal organ samples.* The Federal representative or State representative shall collect a total of 60 chickens from each house and send the chickens to an authorized laboratory for testing of internal organs. The Federal representative or State representative shall include in this sample all chickens that reacted to the blood test in paragraph (c)(1) of this section. If *Salmonella enteritidis* serotype *enteritidis* is recovered from any manure samples tested in accordance with paragraph (b)(1)(i) or egg transport machinery samples tested in accordance with paragraph (b)(1)(ii) of this section, the Federal representative or State representative shall collect additional chickens from the rows that supplied the manure or egg transport machinery samples from which *Salmonella enteritidis* serotype *enteritidis* was recovered, to bring the total number of chickens from each house submitted for internal organ testing to 60.

(d) *Test methods for samples.* Blood samples shall be tested either at the flock premises or at an authorized laboratory, and all other samples shall

be sent for testing to an authorized laboratory. Blood samples shall be tested using a stained-antigen, rapid, whole blood test, in accordance with § 147.3 of this chapter. Manure, egg transport machinery, and internal organ samples shall be sent for testing to an authorized laboratory, where they shall be cultured for identification of *Salmonella enteritidis* serotype *enteritidis* as follows: (1) *Manure and egg transport machinery samples.* Place each sample in approximately 10 times its volume of Hajna TT or Mueller-Kauffmann tetrathionate selective enrichment broth, and incubate at 42 °C for 24 hours. Use each enriched sample to inoculate an agar plate of Brilliant green agar supplemented with novobiocin, and a supplemental medium such as XLD if so desired, and incubate the plates at 37 °C for 24 hours. Inoculate at least 3 *Salmonella*-suspect colonies from each plate to slants of triple-sugar iron (TSI) agar and lysine-iron (LI) agar, and incubate at 37 °C for 24 hours. Cultures showing typical reactions on TSI or LI or both shall be screened with Group D antiserum. Send all Group D isolates to the National Veterinary Services Laboratories for further characterization. (2) *Internal organ samples.* Use each sample to inoculate an agar plate of Brilliant green agar supplemented with novobiocin, and a supplemental medium such as XLD if so desired, and incubate the plates at 37 °C for 24 hours. Inoculate at least 3 *Salmonella*-suspect colonies from each plate to slants of TSI agar and LI agar, and incubate at 37 °C for 24 hours. Cultures showing typical reactions on TSI or LI or both shall be screened with Group D antiserum. Send all Group D isolates to the National Veterinary Services Laboratories for further characterization.

(e) *Release from infected flock status.* A Federal or State representative shall determine that an infected flock is no longer an infected flock, and shall notify in writing the person in control of the flock of that determination, after the Federal or State representative determines that the flock has retested negative as follows: (1) Manure samples and egg transport machinery samples have been collected and tested in accordance with paragraph (b) of this section with no recovery of *Salmonella enteritidis* serotype *enteritidis*, and (2) internal organ samples have been collected and tested in accordance with paragraph (c) of this section with no recovery of *Salmonella enteritidis* serotype *enteritidis*.

**§ 82.33 Interstate movement of articles from test flocks and infected flocks.**

(a) Eggs may be moved interstate from a test flock or an infected flock only for pasteurization, and only if: (1) a permit has been obtained for the interstate movement in accordance with § 82.35 of this part, and (2) the eggs are moved in a completely enclosed compartment of a vehicle that has had a seal applied to it by a Federal or State representative immediately prior to movement.

(b) Live chickens may be moved interstate from a test flock or an infected egg production flock interstate only if: (1) A permit has been obtained for the interstate movement in accordance with § 82.35 of this part; (2) the chickens are moved interstate to a Federally inspected slaughtering establishment; and (3) the chickens are slaughtered within 24 hours of arrival at the Federally inspected slaughtering establishment.

(c) Cages, coops, containers, troughs, and other equipment may be moved interstate from a test flock or an infected egg production flock interstate only if: (1) A permit has been obtained for the interstate movement in accordance with § 82.35 of this part; (2) the equipment is made of hard plastic or metal; (3) the equipment has been cleaned and disinfected in accordance with § 71.7 of this chapter; and (4) the equipment was inspected by a Federal or State representative<sup>2</sup> after it was cleaned but before it was disinfected, and then was disinfected in the presence of a Federal or State representative.

(d) Manure may be moved interstate from a test flock or an infected egg production flock interstate only if: a permit has been obtained for the interstate movement in accordance with § 82.35 of this part; the containers or trailers used to move the manure are filled and covered inside the building housing the flock; the wheels and exposed surfaces of the vehicles used to move the manure are free of manure at the time the manure leaves the premises of the flock; and the manure is moved interstate for one of the following purposes: (1) burial; (2) spreading and turning under on fields not used for grazing or poultry production; or (3) composting in a covered compost heap for a period of at least one month.

<sup>2</sup> The location of Federal or State representatives can be obtained by writing to the Administrator, c/o Sheep, Goat, Equine, and Poultry Diseases Staff, Veterinary Services, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782.

**§ 82.34 Interstate movement of hatching eggs and newly-hatched chicks.**

No hatching eggs or newly-hatched chicks from egg-type chicken breeding flocks may be moved interstate unless they are classified "U.S. Sanitation Monitored" under the National Poultry Improvement Plan (NPIP), or meet the requirements of a State classification plan determined by the Administrator to be equivalent to the NPIP, in accordance with § 145.23(d) of this chapter. Flocks which meet this requirement are designated Certified *Salmonella enteritidis* serotype *enteritidis* Tested Free Flocks.

**§ 82.35 Issuance of permits.**

Permits required by this part may be obtained by applying in writing to a Federal representative.<sup>3</sup> The application shall specify the following: the name and mailing address of the person applying for the permit; the name and mailing address of the person who will receive the poultry or other items; the street addresses of both the origin and destination of the shipment; the number and types of poultry and other items to be moved; and the reason for their movement. A permit will be issued after the Federal representative determines that the equivalent has met all applicable requirements of this chapter.

**§ 82.36 Denial and withdrawal of permits.**

(a) *Denial.* If a Federal representative denies a request for a permit, he or she will send the applicant a written notice of the denial, explaining why the permit was denied.

(b) *Withdrawal.* If a Federal representative determines that the holder of a permit is violating either the regulations or a condition specified in the permit, he or she may withdraw the permit by notifying the holder of the permit of its withdrawal, orally or in writing. If the notice was oral, a written notice of the withdrawal, explaining why the permit was withdrawn, will follow.

(c) *Appeals.* Denial or withdrawal of a permit may be appealed in writing to the Administrator within 10 days after receipt of the written notice of denial or withdrawal. The appeal must tell the Administrator what material facts are in dispute. A hearing will be held with respect to the merits or validity of the denial or withdrawal, in accordance with rules of practice which shall be adopted by the Administrator for the proceeding; however, the withdrawal or denial shall continue in effect pending the completion of the proceeding, and

any judicial review thereof, unless otherwise ordered by the Administrator.

Done in Washington, DC, this 13th day of February 1990.

Larry B. Slagle,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 90-3775 Filed 2-15-90; 8:45 am]

BILLING CODE 3410-34-M

**NATIONAL CREDIT UNION ADMINISTRATION**

**12 CFR Part 745**

**Share Insurance**

**AGENCY:** National Credit Union Administration ("NCUA").

**ACTION:** Final Amendment.

**SUMMARY:** This is a final rule amending the existing part 745 of the NCUA Rules and Regulations by adding a new Subpart B entitled Payment of Share Insurance and Appeals. The amendment sets forth detailed procedures for the payment of share insurance, the initial determination with respect to uninsured funds, requests for reconsideration of the initial determination, and appeals to the NCUA Board.

**EFFECTIVE DATE:** February 16, 1990.

**ADDRESSES:** National Credit Union Administration Board, 1776 G Street, NW, Washington, DC 20456.

**FOR FURTHER INFORMATION CONTACT:** Robert Fenner, General Counsel, or Allan Meltzer, Associate General Counsel, at the above address, or telephone (202) 682-9630.

**SUPPLEMENTARY INFORMATION:** Part 745 of NCUA Rules and Regulations was last revised in 1986. While this part sets forth detailed rules regarding the determination of the amount of share insurance payable upon a liquidation of a federally-insured credit union, it does not set forth any procedures for the appeal of an insurance determination made by the NCUA pursuant to those provisions. The recently enacted Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") contemplates such regulations.

On October 17, 1989 the NCUA Board requested comment on a proposal to amend part 745 by adding a new Subpart B entitled "Payment of Share Insurance and Appeals". (See 54 FR 43297, Oct. 24, 1989.) This proposal sets forth procedures for the payment of insurance on share accounts, provides for an initial insurance determination by the agent for the liquidating agent, a

<sup>3</sup> See Footnote 2 to § 82.33 of this part.

reconsideration at the option of the claimant, and a final determination by the NCUA Board's delegatee.

A total of nine comment letters on this proposal were received. Three of the comments were from federal credit unions, three from credit union leagues, two from national credit union trade associations, and one from a national financial institution trade association. Generally the commenters were supportive of the proposal. However, there were a number of comments about specific parts of the proposal which are discussed below.

The proposed rule would have delegated to the Director, Office of Examination and Insurance, the authority to issue final determinations on insurance claims. This represented a departure from past practice, where the Board itself acted on insurance appeals.

Three commenters objected that final appeals would not go directly to the Board. Two claimed that because FIRREA provides that the NCUA Board issues final determinations, this statutory duty could not be delegated. FIRREA must, however, be viewed in concert with other provisions of the Federal Credit Union Act which provide that the NCUA Board has the authority to delegate any of its functions and powers to its employees. 12 U.S.C. 1766(d) and 1789(a)(10). Accordingly it would be well within the discretionary authority of the Board to delegate this function as provided for in the proposed rule.

It was also suggested that a decision by the Board might be more independent and objective. One commenter agreed with the delegation but disagreed with the authority to redelegate, feeling that this should be limited to someone in the central office.

The Board does not agree that a decision by the Director will be any less independent or objective. Nevertheless, it is as concerned here with the appearance of a conflict as with the reality. Accordingly, the final rule provides that final determinations on insurance appeals will be issued by the Board.

The proposed rule gives the NCUA 180 days to act on a final appeal for insurance coverage. Three commenters objected to this as too long. However, while the rule says a decision should be rendered within 180 days, most such decisions will be reached before that time. The 180 day period is established solely to assure that in the complicated case, requiring significant fact finding and legal analysis, sufficient time will be available to render a just and fair decision. In addition, FIRREA gives the NCUA 180 days to render a decision on

liquidation claims, and there seems to be no reason why a shorter time frame should be established for insurance claims.

The proposed rule stated that a failure by the NCUA to issue a decision within 180 days would be deemed a denial of the claim. Three commenters objected, stating that a claimant is entitled to a written decision which provides the Board's reasoning on its claim. The commenters misinterpret the intent of the provision. It is not intended to provide a shield behind which the NCUA can hide its reasoning on a particular claim. The Board intends and expects that virtually all claims will be disposed of by written decision before the 180 period has elapsed. The provision is merely intended to provide an element of finality for claimants, protecting their right to seek judicial review in the unlikely event that a written decision is not issued.

The proposal also asked for comments on the issue of payment of dividends up to the date of liquidation. Comments were solicited in light of the fact that dividends on credit union shares may only be paid after providing for reserves and operating expenses. Seven of the nine commenters responded to this question.

Five commenters stated that dividends should only be paid after providing for reserves. In general these commenters believe that the distinction between credit union shares and other financial institution deposits is an important one, and that one of the primary differences in that regard is that dividends on share accounts are not guaranteed.

Two commenters believed that dividends should be paid regardless of earnings or reserves. One commenter, a state credit union league, believes that dividends should be paid because: (1) The insurer and regulator usually knows of the insolvent condition of a credit union long before it is liquidated; and (2) not paying dividends might harm the reputation of credit unions. The other commenter stated that NCUA's treatment of dividends should be consistent with the treatment accorded interest payments by the other insurance funds in order to avoid the argument that funds placed in credit unions are not as "protected" as those placed in banks and savings and loans.

The Board believes that the provisions of Section 117 of the Federal Credit Union Act are quite clear. This section provides that dividends may be declared and paid by a credit union board of directors "after provision for required reserves". The Board is therefore including language in the final

rule which prohibits payment of dividends in excess of available earnings. However, dividends which have already been accrued and posted by the credit union during a prior accounting period will be paid and will be treated as principal for the purposes of this provision.

#### **Regulatory Procedures**

##### **Regulatory Flexibility Act**

The NCUA Board has determined and certified that this final rule will not have a significant economic impact on a substantial number of small credit unions (primarily those under \$1 million in assets). The final rule will not impose an additional burden upon credit unions. Accordingly, the Board has determined that a Regulatory Flexibility Analysis is not required.

##### **Paperwork Reduction Act**

The Board has determined that the requirements of the Paperwork Reduction Act do not apply. In any event, it is anticipated that this provision will affect less than ten persons per calendar year.

##### **Executive Order 12612**

The final rule will apply to liquidations of both Federal and federally-insured credit unions. The NCUA Board, pursuant to Executive Order 12612, has determined, however, that this final rule will not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Further, the rule will not preempt provisions of state law or regulation.

##### **List of Subjects in 12 CFR Part 745**

Credit Unions, Account insurance coverage.

By the National Credit Union Administration Board on February 7, 1989.

**Becky Baker,**  
*Secretary of the Board.*

Accordingly, NCUA amends its regulations in 12 CFR chapter VII as follows:

**1. Authority:** The authority citation is revised to read as follows:

**Authority:** 12 U.S.C. 1766, 12 U.S.C. 1781, 12 U.S.C. 1787, 12 U.S.C. 1789.

**2. The heading of Part 745 is revised to read as follows:**

## PART 745—SHARE INSURANCE AND APPENDIX

3. Sections 745.0 through and including 745.13 are designated as a subpart and the subpart heading is added to read as follows: Subpart A—Clarification and Definition of Account Insurance Coverage.

4. A new subpart B consisting of §§745.200 through 745.203 is added to part 745 to read as follows:

### Subpart B—Payment of Share Insurance and Appeals

Sec.

745.200 General.

745.201 Proceeding of insurance claims.

745.202 Appeal.

745.203 Judicial Review.

### Subpart B—Payment of Share Insurance and Appeals

#### § 745.200 General.

(a) *Payment.* In the event of the liquidation of an insured credit union, the Board will promptly determine the insured accountholders thereof and the amount of the insured account or accounts of each such accountholder. Payment may be in cash, or its equivalent, or may be made by making available to each accountholder a transferred account in a new federally-insured credit union in the same community or in another federally-insured credit union or institution in an amount equal to the accountholder's insured account. Notwithstanding the foregoing, the Board may withhold payment of such portion of the insured account of any member as may be required to provide for payment of any direct or indirect liability to the closed credit union or the liquidating agent, which is not offset against a claim due from such credit union, pending the determination and payment of such liability by the member or any person liable therefor.

(b) *Amount of insurance.* The amount of insurance on an insured account shall be determined in accordance with the provisions of Subpart A of this part and the Federal Credit Union Act, provided, however, that no dividends shall be paid on shares if sufficient undivided or current earnings are not available for such purpose.

Notwithstanding the foregoing, dividends accrued and posted to share accounts for any prior accounting period shall be deemed to be principal under this rule.

(c) *Multiple accounts.* In the event an insured member holds more than one insured account in the same capacity, and the aggregate amount of such accounts (including share draft accounts

held in such capacity) exceeds the amount of insurance afforded thereon, the insurance coverage will be prorated among the member's interest in all accounts held in the same capacity. In the case of individual accounts, the insurance proceeds shall be paid to the holder of the account, whether or not the holder is the beneficial owner. In the case of accounts which are owned jointly, the insurance proceeds shall be paid to the owners jointly. In the case of trust estates, the insurance proceeds shall be paid to the indicated trustee unless otherwise provided for in the trust instrument or under state law. In the case of corporations, partnerships and unincorporated associations engaged in an independent activity, the insurance proceeds shall be paid to the indicated holder of the account. Where insurance payment is in the form of a transferred account to another insured institution, the same rules shall be applied.

(d) *Computing time.* In computing any period of time prescribed by this subpart, the provisions of § 747.119 shall apply.

#### § 745.201 Processing of insurance claims.

(a) *Delegations of authority.* The Agent for the Liquidating Agent ("Liquidating Agent") or his or her designee is authorized to make initial determinations with respect to insurance claims pursuant to the principles set forth in this part, and to act on requests for reconsideration of the initial determination.

(b) *Initial determination.* In the event the Liquidating Agent determines that all or a portion of an accountholder's account is uninsured, the Liquidating Agent shall so notify the accountholder in writing, stating the reason(s) for such initial determination, and shall provide the accountholder with a certificate of claim in liquidation in the amount of the uninsured account from the Board in its capacity as Liquidating Agent for the insured credit union to enable the accountholder to share in the proceeds of the liquidation of the credit union, if any, up to the amount of the uninsured account.

(c) *Request for reconsideration.* An accountholder may, at his or her option, request reconsideration from the Liquidating Agent of the initial determination within 30 days of the date of the initial determination, or directly appeal the initial determination to the Board pursuant to § 745.202 of this subpart. The Liquidating Agent shall act on the request for reconsideration within 30 days from its receipt.

#### § 745.202 Appeal.

(a) *Time for filing.* Within 60 days after issuance of an initial determination, or of the determination on a request for reconsideration by the liquidating agent, the accountholder may appeal by filing with the Board a written request for appeal. The appeal may be filed with the Secretary of the Board, National Credit Union Administration, 1776 G Street NW, Washington, DC 20456.

(b) *Content of request.* Any appeal must include:

(1) A statement of the facts on which the claim for insurance is based;

(2) A statement of the basis for the initial determination or determination on the request for reconsideration to which the accountholder objects and the alleged error in such determination, including citations to applicable statutes and regulations;

(3) Any other evidence relied upon by the accountholder which was not previously provided to the Liquidating Agent.

#### (c) Procedures for review of request.

(1) Within 60 days of the date of the Board's receipt of an appeal, the Board may request in writing that the accountholder submit additional facts and records in support of its request. The accountholder shall have 45 days from the date of issuance of such written request to provide such additional information. Failure by the accountholder to provide additional information may, as determined solely by the Board, result in denial of the accountholder's appeal.

(2) Within 60 days from the date of the Board's receipt of an appeal, the accountholder may amend or supplement the request in writing. In the event that the accountholder does amend or supplement the request, the provisions of paragraph (c)(1) of this section with respect to requests for additional information and responses to such requests shall apply with equal force to any such amendment or supplement to a request.

(d) *Determination on appeal.* (1) Within 180 days from the date of the receipt of an appeal by the Board, the Board shall issue a decision determining the extent of the accountholder's insurance pursuant to the rules of this part.

(2) The determination by the Board on appeal shall be provided to the accountholder in writing, stating the reason(s) for the determination, and shall constitute a final Agency order regarding the accountholder's claim for insurance.

(3) If the Board determines that the accountholder is entitled to the amount of insurance claimed or a portion thereof, upon payment of such insurance the accountholder shall promptly surrender to the Board the certificate of claim in liquidation provided in connection with the initial determination. In the event that the Board determines that the accountholder is only entitled to a portion of the amount of insurance claimed, upon the accountholder's surrender of such certificate a new certificate of claim in liquidation will be provided which reflects the revised amount of the uninsured account.

(4) Failure by the Board to issue a determination on appeal of the accountholder's claim for insurance within the 180-day period provided for under this paragraph (d)(1) shall be deemed to be a denial of such claim for purposes of § 745.203 of this subpart.

#### **§ 745.203 Judicial review.**

(a) For purposes of seeking judicial review of actions taken pursuant to this subpart, only a determination on appeal issued by the Board pursuant to Section 745.202 of this subpart shall constitute a final determination regarding an accountholder's claim for insurance.

(b) Failure to file an appeal with regard to an initial determination, or a decision rendered on a request for reconsideration with the applicable time periods shall constitute a failure by the accountholder to exhaust available administrative remedies and, due to such failure, any objections to the initial determination or request for reconsideration shall be deemed to be waived and such determination shall be deemed to have been accepted by, and binding upon, the accountholder.

(c) Final determination by the Board is reviewable in accordance with the provisions of Chapter 7, Title 5, United States Code, by the United States Court of Appeals for the District of Columbia or the court of appeals for the Federal judicial circuit where the credit union's principal place of business is located. Such action must be filed not later than 60 days after such final determination is ordered.

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#### **12 CFR Part 747**

#### **Administrative Actions, Adjudicative Hearings and Rules of Practice and Procedure**

**AGENCY:** National Credit Union Administration ("NCUA").

#### **ACTION:** Final rule.

**SUMMARY:** This is a final rule amending part 747 of the NCUA Rules and Regulations. These rules will assist the agency comply with the enhanced enforcement provisions given to the NCUA Board under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA").

**EFFECTIVE DATE:** February 16, 1990.

**FOR FURTHER INFORMATION CONTACT:** Robert M. Fenner, General Counsel, or Richard S. Schulman, Trial Attorney, at the above address or telephone: (202) 682-9630.

**SUPPLEMENTARY INFORMATION:** On October 24, 1989, the NCUA Board published a proposed rule on investigations. (See 54 FR 43299). The proposal was issued with a sixty day comment period. The rules set forth the mechanics of conducting formal investigations to prevent or remedy violations of applicable laws and regulations. The rule is set forth in two parts: Subpart J—Rules and Procedures Applicable to Investigations; and Subpart F—Formal Investigative Proceedings.

#### **Discussion**

Ten comments were received. Four were from federal credit unions, two from national credit union trade groups, two from state credit union leagues, and two from other types of trade associations.

The majority of comments focused on the NCUA Board's request for input in defining "institution-affiliated party." Several comments expressed individual preferences on who should or should not be included in a prospective list of such parties. The predominant comment, however, was that the NCUA Board should determine institution-affiliation based upon the particular relationship with the insured credit union and not based on a prospective list. Based on these comments, the NCUA Board is reserving any decision on creating a prospective list of "institution-affiliated parties."

The matter of "institution-affiliation" as addressed in the rule focuses on the NCUA Board's enforcement powers. The use of the term, "institution-affiliated parties" within § 747.1003(a) may have led to some confusion over what parties are subject to NCUA's subpoena power. NCUA Board subpoena power is not limited to "persons participating in the affairs of a credit union" or "institution-affiliated parties." Parties addressed in an agency subpoena need not be subject to the regulatory powers of the agency. See, *Sandsend Financial Consultants v.*

*FHLBB*, 878 F.2d 875, 879 (5th Cir. 1989); *NCUA v. Beacon Community Federal Credit Union*, 502 F.Supp 182, 184 (1980). Several commenters feared that the NCUA Board's enhanced powers could lead to unwarranted investigations. We believe these fears are unjustified.

A subpoena issued by the NCUA Board is subject to judicial challenge by parties subject to subpoenas and enforcement actions brought by the NCUA Board. Congress has given many agencies similar powers to conduct investigations.

The Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome. The federal courts stand guard, of course, against abuses of their subpoena-enforcement processes but \* \* \* it has long been clear that "it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant."

*Securities and Exchange Commission v. Arthur Young & Company*, 584 F.2d 1018, 1024 (D.C. Cir. 1978). This case discusses several issues raised by commenters including delegation authority, scope of investigations and subpoena powers.

The NCUA Board is sensitive to its use of formal investigative powers while mindful of its responsibility to protect credit union members, credit unions and the National Credit Union Share Insurance Fund.

The scope of these final rules have not changed since their proposal. Minor changes and clarifications have been made based upon public comments and staff review. With the exception of certain grammatical changes, changes from the proposed rule are discussed below.

#### **(a) Institution-Affiliated Parties**

One commenter pointed out potential constitutional conflicts over retroactive application of FIRREA enforcement actions. Although this is a matter to be ultimately determined in the courts, the NCUA Board is satisfied that retroactive application, where appropriate, will not create an injustice to such parties.

FIRREA's enforcement measures strengthen the NCUA Board's ability to pursue parties that have violated law and regulation. Parties addressed under these measures have no more present duty to obey the NCUA Board's regulations or the Federal Credit Union Act than before FIRREA. The mere fact that the banking agencies previously lacked some necessary enforcement tools does not absolve past violations of

the Federal Credit Union Act, and NCUA Rules and Regulations.

The NCUA Board may issue an Interpretative Ruling and Policy Statement or NCUA Letter in the future discussing the major criteria it will consider in making case-by-case determinations of "institution-affiliation." In the interim, the NCUA Board will define "institution-affiliated parties" on a "case-by-case basis" pursuant to section 206 of the Federal Credit Union Act, 12 U.S.C. 1786(r). The authority to determine "institution-affiliation" has not been delegated by the NCUA Board. When, and if, the NCUA Board determines that a list of affiliated parties is productive and necessary, the Board will further address the matters raised by the comments already received in a proposed regulation and reopen the period for additional comments.

The Board wishes to clarify several areas raised by the comment letters concerning "institution-affiliation." In two comments, there appeared to be confusion over the extent of the Board's authority over institution-affiliation parties. Several commenters thought that the Board will extend its credit union examination and supervisory authority to cover, for example, those parties defined in the statute, such as a joint venture partner or consultant. Neither these final rules nor FIRREA give the Board this power.

The Board's authority extends to established administrative or civil remedies against the credit union or institution affiliated party, as defined, to eliminate or remedy a violation and compensate for losses. When the Board is asked to impose administrative measures against a party, they will have to determine whether the party meets the Federal Credit Union Act's definition of "institution-affiliation." See section 206(r) of the Federal Credit Union Act.

#### (b) Other Comments

One commenter recommended that investigative targets not be sequestered from the testimony of witnesses. The practice of witness sequestration is common throughout the federal government and with sound basis. Investigations require access to information. The NCUA Board believes that the presence of targets and their counsel will do more to inhibit than encourage complete and honest testimony and will discourage witnesses from providing documents which might be subject to third party inspection at an open deposition. The presence of interested spectators will act to defeat the limited use and protection of subpoenaed testimony and documents.

A commenter suggested that information regarding investigations and the order of investigation should be available under the Freedom of Information Act ("FOIA") (5 U.S.C. 552). Another commenter argued against public disclosure. It is the NCUA Board's opinion that such information is compiled for law enforcement purposes and thereby exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552(b)(7)).

One commenter wanted a definition of "informal" investigations within the rules beyond that set forth in § 747.1003(b). These rules intentionally do not contain set standards for "conducting" informal investigations. The Board expects its staff to be informally investigating matters related to insured credit unions every day through, for example, routine credit union examinations and contacts. The use of the term "informal" within the rule is merely a convenient device to distinguish formal investigations.

One commenter wanted a definition of the term "fitness" as it is used in § 747.1003(a). Fitness is a standard that varies from case to case. The Board believes that creating a definitive standard of "fitness" would not be beneficial. Such a definition would have the negative effect of prescribing a Board imposed character and qualification composite of an ideal credit union employee, officer or director.

One commenter recommended amendment of the NCUA Board's delegation to the General Counsel in § 747.1003 because it would conflict with § 747.115(b) of the NCUA Rules and Regulations. Section 747.115 addresses hearings before the NCUA Board after it has issued an order as described in § 747.101(a) of the NCUA Rules and Regulations. As such, it is inapplicable for the purposes of this rule. The Board and the General Counsel will be cautious to avoid actual or apparent conflicts.

One commenter stated that further delegation of investigatory power could lead to abusive powers by the officer conducting the investigation. The Board is satisfied that checks and balances exist within the agency to protect the public from unwarranted investigations. The officer conducting the investigation is limited to investigating matters within the investigatory order.

Another commenter recommended disclosure of investigative orders to witnesses and the public. Disclosure of investigative orders to the public could injure innocent parties and interfere in the investigative process. The investigative order is normally made

part of the record at a deposition and is available for inspection by the witness and counsel during the course of any testimony. The Board's subpoena also contains information to the witness regarding the purpose of the investigation. This is referred to in the subpoena as "principal uses of information." This information provides the witness background into the inquiry and the jurisdictional authority of NCUA over the matter under investigation. It also gives the witness the ability to assess potential culpability in the matter under investigation.

The staff raised a concern that the delegation language in § 747.1003(c) should include language that investigation authority extends to the NCUA Board's power as liquidator and conservator. Although silent, the proposed rule intended to include these functions within the scope of investigatory powers. However, to avoid doubt, we are adding the clarifying language proposed by the staff.

The Board may in appropriate cases, such as liquidation and conservatorship actions, rely on outside counsel and other experts for assistance. These individuals may be delegated much of the authority of an officer conducting the investigation. The Board does not intend, however, to delegate the power to issue subpoenas to outside counsel or other experts. Outside counsel and other experts may otherwise fully participate in all aspects of any such investigation. The delegation language under § 747.1003(c) has, therefore, been clarified.

There were several comments regarding the clarity of § 747.1003(a). Since this section defines the scope of NCUA's investigative authority, the commenters sought clarification. The Board believes this section is sufficiently clear given the breadth of its authority.

One commenter on § 747.1103(c), recommended that witness fees should be prepaid by NCUA. The commenter believed that requiring a witness to prepay expenses was an unfair burden. Another commenter recommended that witness fees be reimbursed within thirty days from the date of appearance.

The Board recognizes the temporary burden placed upon a witness subpoenaed to testify in an investigation. NCUA will make every effort to reimburse a witness as soon as possible. However, a rule requiring witness fees to be paid in advance may unduly delay an investigation. Moreover, NCUA will not prepay a witness when there is no guarantee that the funds will be applied to the

witnesses appearance. Finally, it is easier for individuals to make their own travel plans. The Board is not insensitive to the needs of potential witnesses and instructs its staff accordingly. When a situation arises where financial constraints makes it difficult for a witness to comply, the Board will respond appropriately.

One commenter believed the "notice" provisions of § 747.1103(b) were less than adequate to assure "actual" notice. The Board believes the current language is sufficient. The final rule at § 747.1103(d) contains language for enforcing an applicable subpoena. The commenter is apparently concerned with possible negative implications or effect upon a deponent who fails to appear before the investigating officer for lack of notice. When a deponent fails to appear on a scheduled date, the investigating officer will determine the cause of this failure. When it is determined that the deponent has been served and is deliberately avoiding appearance, the NCUA Board must apply to the federal courts for enforcement. When it appears that the deponent did not receive notice of the hearing, the investigating officer will take steps to ensure proper notice.

Several commenters suggested that all deposed parties be sworn and an official transcript made. Both suggested that witnesses have an undeniable right to possess a copy of their testimony upon payment of costs. One commenter suggested in the interest of gathering facts, that witnesses be permitted to tape record their own testimony.

While the prospect of a deposed witness not being sworn and recorded is unforeseen at this time, the potential should be recognized through the regulation. Witnesses and their counsel are free to take notes during a deposition. However, the witnesses are present to give testimony and not to pay attention to extraneous devices such as tape recorders. In all foreseeable cases, the witness would be entitled to review and/or purchase transcripts of their own testimony. See, *Securities and Exchange Commission v. Sprecher*, 594 F.2d 317 (2d Cir. 1979).

Finally, one commenter recommended placing these rules at the beginning of part 747 since an investigation logically precedes an adjudicative proceeding. The Board does not believe that the current placement will lead to confusion. Nevertheless, the title, "Investigations" is being added to part 747.

## Regulatory Procedures

### *Regulatory Flexibility Act*

The NCUA Board has determined and certifies that this final rule will not have a significant economic impact on a substantial number of small credit unions (primarily those under \$1 million in assets). It will not impose an additional burden upon credit unions. Accordingly, the Board has determined that a Regulatory Flexibility Analysis is not required.

### *Paperwork Reduction Act*

The Board has determined that the requirements of the Paperwork Reduction Act do not apply.

### *Executive Order 12612*

The Board, pursuant to Executive Order 12612, has determined that this rule will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Further the new rule will not preempt provisions of state law or regulation.

### List of Subjects in 12 CFR Part 747

Administrative actions, Adjudicative hearings, and Rules of Practice and Procedure.

By the National Credit Union Administration Board on February 7, 1990.

Becky Baker,

Secretary of the Board.

Accordingly, NCUA amends 12 CFR part 747 as follows:

1. The authority citation is revised to read as follows:

Authority: 12 U.S.C. 1786, 12 U.S.C. 1784, 12 U.S.C. 1786, 12 U.S.C. 1787, 12 U.S.C. 1789, 12 U.S.C. 1995c.

2. The Table of Contents of part 747 is revised to read as follows:

## PART 747—ADMINISTRATIVE ACTIONS, ADJUDICATIVE HEARINGS, RULES OF PRACTICE AND PROCEDURE AND INVESTIGATIONS

Sec.

747.01 Scope.

### Subpart A—Rules of Practice and Procedure

747.101 Scope.

747.102 Appearance and practice before the Administration.

747.103 Notice of hearing.

747.104 Answer.

747.105 Failure to appear.

747.106 Conduct of hearing.

747.107 Subpoenas.

747.108 Rules of evidence.

747.109 Motions.

Sec.

747.110 Proposed findings and conclusions and recommended decision.

747.111 Exceptions.

747.112 Briefs.

747.113 Oral argument before the Board.

747.114 Notice of submission to the Board.

747.115 Decision of the Board.

747.116 Filing papers.

747.117 Service.

747.118 Copies.

747.119 Computing time.

747.120 Documents in proceedings confidential.

747.121 Formal requirements as to papers filed.

747.122 Availability to public of final orders.

### Subpart B—Rules and Procedures

#### Applicable to Proceedings for the Involuntary Termination of Insured Status

747.201 Scope.

747.202 Grounds for termination of insurance.

747.203 Notice of charges.

747.204 Notice of intention to terminate insured status.

747.205 Order terminating insured status.

747.206 Consent to termination of insured status.

747.207 Notice of termination of insured status.

747.208 Duties after termination.

### Subpart C—Rules and Procedures

#### Applicable to Proceedings Relating to Cease-and-Desist Actions

747.301 Scope.

747.302 Grounds for cease-and-desist orders.

747.303 Notice of charges and hearing.

747.304 Issuance of order.

747.305 Effective date.

747.306 Temporary cease-and-desist orders.

### Subpart D—Rules and Procedures

#### Applicable to Proceedings Relating to Assessment and Collection of Civil Penalties

747.401 Scope.

747.402 Grounds for assessment of civil money penalties.

747.403 Relevant considerations.

747.404 Notice of assessment.

747.405 Period within which penalty is payable.

747.406 Notice of opportunity for hearing.

747.407 Request for hearing.

747.408 Hearing and order.

747.409 Collection.

### Subpart E—Rules and Procedures

#### Applicable to Proceedings Relating to 206(g) Suspension and Removal Actions

747.501 Scope.

747.502 Grounds for removal or prohibition.

747.503 Notice of intent to remove or prohibit; notice of hearing.

747.504 Issuance of removal order and effective date.

747.505 Suspension and immediate prohibition.

747.506 Effect of removal, prohibition, or suspension.

747.507 Remainder of the board of directors.

**Subpart F—Rules and Procedures Applicable to Suspensions and Prohibitions Where Felony Charged**

Sec.

- 747.601 Scope.
- 747.602 Rules of practice.
- 747.603 Notice of suspension or prohibition.
- 747.604 Removal or permanent prohibition.
- 747.605 Effectiveness of suspension or removal until completion of hearing.
- 747.606 Notice of hearing.
- 747.607 Hearing.
- 747.608 Waiver of hearing; failure to request hearing or review based on written submissions; failure to appear.
- 747.609 Decision of the Board.
- 747.610 Reconsideration by the Board.
- 747.611 Relevant considerations.

**Subpart G—Rules and Procedures Applicable to Proceedings Relating to the Suspension or Revocation of Charters and to Involuntary Liquidations**

- 747.701 Scope.
- 747.702 Grounds for suspension or revocation of charter and for involuntary liquidation.
- 747.703 Notice of intent to suspend or revoke charter; notice of suspension.
- 747.704 Notice of hearing.
- 747.705 Issuance of order.
- 747.706 Cancellation of charter.

**Subpart H—Rules and Procedures Applicable to Proceedings Relating to the Termination of Membership in the Central Liquidity Facility [Reserved]**

**Subpart I—Rules and Procedures Applicable to Recovery of Attorneys Fees and Other Expenses Under the Equal Access to Justice Act in Board Adjudications**

- 747.901 Purpose and scope.
- 747.902 Eligibility of applicants.
- 747.903 Prevailing party.
- 747.904 Standards for awards.
- 747.905 Allowable fees and expenses.
- 747.906 Contents of application.
- 747.907 Statements of net worth.
- 747.908 Documentation of fees and expenses.
- 747.909 Filing and service of applications.
- 747.910 Answer to application.
- 747.911 Comments by other parties.
- 747.912 Settlement.
- 747.913 Further proceedings.
- 747.914 Recommended decision.
- 747.915 Decision of the Board.
- 747.916 Payment of award.

**Subpart J—Rules and Procedures Applicable to Investigations**

- 747.1001 Applicability.
- 747.1002 Information obtained in investigations.
- 747.1003 Authority to conduct investigations.

**Subpart K—Formal Investigative Proceedings**

- 747.1101 Applicability.
- 747.1102 Non-public formal investigative proceedings.
- 747.1103 Subpoenas.
- 747.1104 Oath; false statements.
- 747.1105 Self-incrimination; Immunity.
- 747.1106 Transcripts.

Sec.

747.1107 Rights of witnesses.

- 3. A new subpart J of part 747 is added to read as follows:

**Subpart J—Rules and Procedures Applicable to Investigations**

**§ 747.1001 Applicability.**

The rules in this subpart apply only to informal and formal investigations conducted by the Board itself or its delegates. They do not apply to adjudicative or rulemaking proceedings or to routine, periodic or special examinations conducted by the Board's staff.

**§ 747.1002 Information obtained in investigations.**

Information and documents obtained by the Board in the course of any investigation, unless made a matter of public record by the Board, shall be deemed non-public, but the Board approves the practice whereby the General Counsel may engage in, and may authorize any person acting on his behalf or at his direction to engage in, discussions with representatives of domestic or foreign governmental authorities, self-regulatory organizations, and with receivers, trustees, masters and special counsels or special agents appointed by and subject to the supervision of the courts of the United States, concerning information obtained in individual investigations, including investigations conducted pursuant to any order entered by the Board or its General Counsel pursuant to delegated authority.

**§ 747.1003 Authority to conduct investigations.**

(a) The General Counsel and persons acting on his behalf and at his direction may conduct such investigations into the affairs of any insured credit union or institution-affiliated parties as deemed appropriate to determine whether such credit union or party has violated, is violating or is about to violate any provision of the Federal Credit Union Act, the Board's regulations or other relevant statutes or regulations that may bear on a party's fitness to participate in the affairs of a credit union. The General Counsel and persons acting on his behalf may investigate whether any party is unfit to participate in the affairs of a credit union, whether formal enforcement proceedings are warranted, or such other matters as the General Counsel or his designee, in his discretion, shall deem appropriate. Such investigations may be conducted either informally or formally.

(b) Formal investigations involve the exercise of the Board's subpoena power

and are referred to here as formal investigative proceedings. In formal investigative proceedings, the General Counsel and those to whom he delegates authority to act on his behalf and at his direction have augmented investigatory powers and need not rely on the powers available to them in informal investigations, and they may gather evidence through the issuance of subpoenas compelling the production of documents or testimony as well. In informal investigations evidence may be gathered ordinarily through the use of investigatory procedures or credit union examinations and through voluntary statements and submissions.

(c) The Board has delegated authority to the General Counsel, or designee thereof, to institute formal investigative proceedings by the entry of an order indicating the purpose of the investigation and the designation of persons to conduct that investigation on his behalf and at his direction. This delegation also extends to the Board's role as liquidator and conservator of insured credit unions. The power to issue a subpoena may not be delegated outside the agency. The General Counsel may amend such order as he deems appropriate.

- 4. A new Subpart K to part 747 is added as follows:

**Subpart K—Formal Investigative Proceedings**

**§ 747.1101 Applicability.**

The rules in this subpart are applicable to a witness who is sworn in a formal investigative proceeding. Formal investigative proceedings may be held before the Board, before one or more of its members, or before any officer designated by the Board or its General Counsel, as described in Subpart J, and with or without the assistance of such other counsel as the Board deems appropriate, for the purpose of taking testimony of witnesses, conducting an investigation and receiving other evidence. The term "officer conducting the investigation" shall mean any of the foregoing.

**§ 747.1102 Non-public formal investigative proceedings.**

Unless otherwise ordered by the Board, all formal investigative proceedings shall be non-public.

**§ 747.1103 Subpoenas.**

(a) *Issuance.* In the course of a formal investigative proceeding the officer conducting the investigation may issue a subpoena directing the party named therein to appear before the officer

conducting the investigation at a specified time and place to testify or to produce documentary evidence, or both, relating to any matter under investigation.

(b) *Service.* Service of subpoenas shall be effected in the following manner: (1) *Service upon a natural party.* Delivery of a copy of a subpoena to a natural person may be effected by (i) handing it to the person; (ii) leaving it at his office with the person in charge thereof or, if there is no one in charge, by leaving it at a conspicuous place there; (iii) leaving it at his dwelling place or usual place of abode with some person of suitable age and discretion who is found there; or (iv) mailing it by registered or certified mail to him at his last known address. In the event that personal service as described in paragraph (b)(1) (i) through (iv) of this section is impracticable, any other method whereby actual notice is given to the respondent may be employed. (2) *Service upon other persons.* When the person to be served is not a natural person, delivery of a copy of the subpoena may be effected by (i) handing it to a registered agent for service, or to any officer, director, or agent in charge of any office of such person; (ii) mailing it by registered or certified mail to any such representative at his last known address; or (iii) any other method whereby actual notice is given to any such representative.

(c) *Witness fees and mileage.*

Witnesses appearing pursuant to subpoena shall be paid the same fees and mileage that are paid to witnesses in the United States district courts. Any such fees and mileage payments need to be paid only upon submission of a properly completed application for reimbursement and in no event need they be paid sooner than thirty days after the appearance of the witness pursuant to subpoena.

(d) *Enforcement.* Whenever it appears to the General Counsel that any person upon whom a subpoena was properly served pursuant to these Rules is refusing to fully comply with the terms of that subpoena, then the General Counsel, in his discretion, may apply to the courts of the United States for enforcement of such subpoena.

**§ 747.1104 Oath; false statements.**

At the discretion of the officer conducting the investigation, testimony of a witness may be taken under oath and administered by the officer. Any person making false statements under oath during the course of a formal investigative proceeding is subject to the criminal penalties for perjury in 18 U.S.C. 1621. Any person who knowingly

and willfully makes false and fraudulent statements, whether under oath or otherwise, or who falsifies, conceals or covers up any material fact, or submits any false, fictitious or fraudulent information in connection with such a proceeding, is subject to the criminal penalties set forth in 18 U.S.C. 1001.

**§ 747.1105 Self-incrimination; immunity.**

(a) *Self-incrimination.* Except as provided below, a witness testifying or otherwise giving information in a formal investigative proceeding may refuse to answer questions on the basis of his right against self-incrimination granted by the Fifth Amendment of the Constitution of the United States.

(b) *Immunity.* (1) No officer conducting any formal investigative proceeding (or any other informal investigation or examination) shall have the power to grant or promise any party any immunity from criminal prosecution under the laws of the United States or of any other jurisdiction. (2) If the Board believes that the testimony or other information sought to be obtained from any party may be necessary to the public interest and that party has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination, the Board, with the approval of the Attorney General, may issue an order requiring the party to give testimony or provide other information that he has previously refused to provide on the basis of self-incrimination. (3) Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a formal investigative proceeding, and the officer conducting the investigation

communicates to that person an order of the Board requiring him to testify or provide other information, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

**§ 747.1106 Transcripts.**

Transcripts, if any, of formal investigative proceedings shall be recorded solely by the official reporter, or by any other person or means designated by the officer conducting the investigation. A party who has submitted documentary evidence or testimony in a formal investigative

proceeding shall be entitled, upon written request, to procure a copy of his documentary evidence or a transcript of his testimony on payment of the appropriate fees; provided, however, that in a non-public formal investigative proceeding the Board may for good cause deny such request or the Board may place reasonable limitations upon the use of the documentary evidence and transcript. In any event, any witness, upon proper identification, shall have the right to inspect the official transcript of the witness' own testimony.

**§ 747.1107 Rights of witnesses.**

(a) In the event that a formal investigative proceeding is conducted pursuant to specific order entered by the Board or by its General Counsel, then any party who is compelled or requested to provide documentary evidence or testimony as part of such proceeding shall, upon request be shown a copy of the Board's or its delegate's order. Copies of such orders shall not be provided for their retention to such persons requesting same except in the sole discretion of the General Counsel or his designee.

(b) Any party compelled to appear, or who appears by request or permission of the officer conducting the investigation, in person at a formal investigative proceeding may be accompanied, represented and advised by counsel who is a member of the bar of the highest court of any state; provided however, that all witnesses in such proceeding shall be sequestered, and unless permitted in the discretion of the officer conducting the investigation, no witness or the counsel accompanying any such witness shall be permitted to be present during the examination of any other witness called in such proceeding.

(c)(1) The right to be accompanied, represented and advised by counsel shall mean the right of a person testifying to have an attorney present with him during any formal investigative proceeding and to have this attorney (i) advise such person before, during and after such testimony, (ii) question such person briefly at the conclusion of his testimony to clarify any answers such person has given, and (iii) make summary notes during such testimony solely for the use of such person.

(2) The Board realizes that, from time to time, in the discretion of the officer, it shall be necessary for persons other than the witness and his counsel to attend non-public investigative proceedings. Thus, for example, the officer may deem it appropriate that outside counsel to the Board attend and

advise him concerning the proceeding including the examination of a particular witness. In these circumstances, outside counsel would not be an officer as that term is used. In other circumstances, it may be appropriate that a technical expert (such as an accountant) accompany the witness and his counsel in order to assist counsel in understanding technical issues. The Board wishes to emphasize that these latter circumstances should be rare, are left to the discretion of the officer conducting the investigation, and shall not in any event be allowed to serve as a ruse to coordinate testimony between witnesses, or oversee or supervise the testimony of any witness, or otherwise defeat the beneficial effects of the witness sequestration rule.

(d) The officer conducting the investigation may report to the Board any instances where any witness or counsel has been guilty of dilatory, obstructionist or contumacious conduct during the course of a formal investigative proceeding or any other instance of violations of these rules. The Board will thereupon take such further action as the circumstance may warrant including barring the offending person from further participation in the particular formal investigative proceeding or even from further practice before the Board.

[FR Doc. 90-3483 Filed 2-15-90; 8:45 am]

BILLING CODE 7535-01-M

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. 90-CE-02-AD; Amdt. 39-6513]

#### Airworthiness Directives; Cessna Models 208, 208A and 208B Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This amendment adopts a new Airworthiness Directive (AD), applicable to Cessna Models 208, 208A and 208B airplanes which requires inspection of the right flap bellcrank for cracks, deformation and/or incomplete welds and replacement as necessary. The FAA has received reports of failure of this bellcrank which would result in inadvertent retraction of the flaps and loss of the airplane. The actions specified in this AD will preclude such inadvertent flap retractions and the resultant loss of airplane control.

**EFFECTIVE DATE:** March 5, 1990.

**Compliance:** As prescribed in the body of the AD.

**ADDRESSES:** Cessna Service Letter CAB89-34, dated December 22, 1989, applicable to this AD may be obtained from the Cessna Aircraft Company, Customer Services, P.O. Box 7704, Wichita, Kansas 67217. This information may also be examined at the FAA, Central Region, Office of the Assistant Chief Counsel, Room 1558, 601 East 12th Street, Kansas City, Missouri 64106.

**FOR FURTHER INFORMATION CONTACT:** Douglas W. Haig, Aerospace Engineer, Federal Aviation Administration, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Wichita, Kansas 67209; Telephone 316-946-4409.

**SUPPLEMENTARY INFORMATION:** During an approach for landing a Cessna Model 208 airplane experienced a sudden, unexpected retraction of the flaps. This occurrence resulted from the failure of the Part Number (P/N) 2622083-18 bellcrank assembly caused by incomplete welding of the assembly. The FAA has also become aware of two similar failures in other Cessna 208 series airplanes. Since the FAA has determined that the unsafe condition described herein is likely to exist or develop in other airplanes of the same type design, an AD is being issued, applicable to Cessna Models 208, 208A, and 208B airplanes, requiring inspection of the P/N 2622083-18 bellcrank for correct welding, cracks or deformation, and replacement as necessary. Because an emergency condition exists that requires the immediate adoption of this regulation, it is found that notice and public procedure hereon are impractical and contrary to the public interest, and good cause exists for making this amendment effective in less than 30 days.

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The FAA has determined that this regulation is an emergency regulation and that it is not considered to be major under Executive Order 12291. It is impracticable for the agency to follow the procedures of Order 12291 with respect to this rule since the rule must be issued immediately to correct an unsafe condition in aircraft. It has been determined further that this action

involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). If it is determined that this emergency regulation otherwise would be significant under DOT Regulatory Policies and Procedures, a final regulatory evaluation will be prepared and placed in the Rules Docket (otherwise, an evaluation is not required). A copy of it, if filed, may be obtained from the Rules Docket.

#### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

#### Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

#### PART 39—[AMENDED]

1. The authority citation for part 39 continues to read as follows:

**Authority.** 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

#### § 39.13 [Amended]

2. Section 39.13 is amended by adding the following new AD:

**Cessna. Applies to Model 208 and 208A (Serial Numbers 20800001 through 20800173), and 208B (Serial Numbers 208B0001 through 208B0202) airplanes certificated in any category.**

**Compliance:** Required within the next 50 hours time-in-service (TIS) after the effective date of this AD, unless already accomplished.

To prevent failure of the Part Number (P/N) 2622083-18 bellcrank assembly and the resulting unexpected retraction of the flaps, accomplish the following:

(a) Visually inspect the P/N 2622083-18 bellcrank assembly for cracks, deformation, and incomplete welds in accordance with Cessna Service Bulletin CAB 89-34, dated December 22, 1989.

(1) If any cracks or deformations are found, prior to further flight replace the P/N 2622083-18 bellcrank with an airworthy bellcrank.

(2) If any incomplete welds are found, within the next 50 hours TIS replace the P/N 2622083-18 bellcrank with an airworthy bellcrank.

(3) If any bellcranks are to be replaced, inspect the replacement part in accordance with Cessna SB CAB 89-34 dated 12-22-89 before installation.

(b) Airplanes may be flown in accordance with FAR 21.197 to a location where this AD may be accomplished.

(c) An alternate method of compliance or adjustment of the initial or repetitive compliance times which provides an equivalent level of safety may be approved by the Manager, Wichita Aircraft

Certification Office, 1801 Airport Road, Room 100, Wichita, Kansas 67209.

**Note**—The request should be forwarded through an FAA Maintenance Inspector, who may add comments and then send it to the Manager, Wichita Aircraft Certification Office.

All persons affected by this directive may obtain copies of the document referred to herein upon request to the Cessna Aircraft Company, Customer Services, P.O. Box 7704, Wichita, Kansas 67217, or may examine this document at the FAA, Central Region, Office of the Assistant Chief Counsel, Room 1558, 601 East 12th Street, Kansas City, Missouri 64106.

This amendment becomes effective on March 5, 1990.

Issued in Kansas City, Missouri, on February 6, 1990.

**Don C. Jacobsen,**  
Acting Manager, Small Airplane Directorate  
Aircraft Certification Service.

[FR Doc. 90-3665 Filed 2-15-90; 8:45 am]

BILLING CODE 4910-13-M

#### 14 CFR Part 39

[Docket No. 89-CE-30-AD; Amdt. 39-6512]

#### Airworthiness Directives; Cessna 208 Series Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This amendment adopts a new Airworthiness Directive (AD), applicable to certain Cessna 208 series airplanes, which requires inspection of the engine mount ring lower attachment points and replacement of the nose landing gear shimmy dampener. The FAA has received several reports of failure of shimmy dampener which have led to severe shimmy of the nose wheel. This action will lower the possibility of nose landing gear shimmy, detect cracks in the engine mounting, and preclude separate of the engine from the airplane.

**EFFECTIVE DATES:** March 23, 1990.

Compliance: As prescribed in the body of the AD.

**ADDRESSES:** Cessna Caravan Service Bulletin CAB88-14, dated April 8, 1988, applicable to this AD may be obtained from the Cessna Aircraft Company, P.O. Box 7704, Wichita, Kansas 67277, or may be examined at the FAA, Central Region, Office of the Assistant Chief Counsel, Room 1558, 601 East 12th Street, Kansas City, Missouri 64106.

**FOR FURTHER INFORMATION CONTACT:** Douglas W. Haig, Wichita Aircraft Certification Office, Mid-Continent Airport, 1801 Airport Road, Room 100, Wichita, Kansas 67209; Telephone (316) 946-4409.

**SUPPLEMENTARY INFORMATION: A** proposal to amend part 39 of the Federal Aviation Regulations to include an AD requiring inspection of the engine mount ring lower attachment points and replacement of the nose landing gear shimmy dampener to minimize the potential for structural damage to the engine mount ring resulting from severe shimmy encounters on certain Cessna Model 208 airplanes was published in the **Federal Register** on November 13, 1989 (54 FR 47216). The proposal was prompted by a May 5, 1988 incident when a Cessna Model 208 Caravan I airplane experienced severe shimmy of the nose wheel assembly during landing. Upon examination it was determined that failure of the nose landing gear shimmy dampener allowed the gear to vibrate and induce cracks in the lower corners of the engine mount ring.

The FAA is also aware of several similar occurrences on Model 208 airplanes of cracked engine mount rings being found after nose gear shimmy encounters. The service records of the Cessna Aircraft Company indicate 17 additional reports of cracks in the lower portion of the engine mount ring. If these cracks are allowed to develop through the mount ring, the reduced stiffness of the engine support system may result in a whirl mode flutter instability of the propeller-powerplant system. Additionally, complete failure of the engine mount could result in separation of the engine from the airplane. Cessna has incorporated a different shimmy dampener on more recently manufactured 208 series airplanes. This new design utilizes two ports to assist in fluid filling and air expulsion during servicing operations. Cessna has issued Cessna Service Bulletin CAB88-14, dated April 8, 1988, specifying the new and improved shimmy dampener, Part Number (P/N) 2643090-1, for affected Model 208, 208A, and 208B airplanes. This new shimmy dampener will lower the possibility of nose landing gear shimmy and minimize the potential for structural damage to the engine mount ring.

Therefore, an AD was proposed which would require replacement of the old design shimmy dampener in accordance with Service Bulletin CAB88-14, as well as inspection of the engine mount ring for cracks.

Interested persons have been afforded an opportunity to comment on the proposal. No comments or objections were received on the proposal or the FAA determination of the related cost to the public. Accordingly, the proposal was adopted without change.

The FAA has determined that this regulation only involves 212 airplanes at an approximate cost of \$1,421, for each airplane. The total cost is estimated to be \$301,252. The FAA has determined that all but 35 of these affected airplanes have already complied with the referenced service instructions. The actions specified in the AD will not have a significant financial impact on any small entities operating these airplanes.

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a **Federalism Assessment**. Therefore, I certify that this action (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the final evaluation prepared for this action is contained in the regulatory docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption "**ADDRESSES**".

#### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

#### Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

#### PART 39—[AMENDED]

1. The authority citation for part 39 continues to read as follows:

**Authority:** 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) [Revised Pub. L. 97-449, January 12, 1983]; and 14 CFR 11.89.

#### § 39.13 [Amended]

2. Section 39.13 is amended by adding the following new AD:

**Cessna:** Applies to Models 208 and 208A (Serial Numbers 20800001 through 20800130), and Model 208B (Serial Numbers 208B0001 through 208B0086) airplanes certificated in any category.

Compliance: Required within the next 100 hours time-in-service after the effective date of this AD, unless already accomplished.

To prevent nose landing gear shimmy and failure of the engine mount ring, accomplish the following:

(a) Visually inspect the lower portion of the engine mount ring for misalignment and cracks.

(1) If any ring has a visible misalignment, or has a crack longer than 1.7 inches, prior to further flight replace the ring with a serviceable part.

(2) If any ring has a crack less than 1.7 inches, prior to further flight repair the ring in accordance with the Cessna Model 208 Maintenance Manual, Part Number (P/N) 02076-2-13.

(b) Replace the shimmy dampener (Part Number 2643007-1 or -2) with a Part Number 2643090-1 shimmy dampener in accordance with the instructions in Cessna Caravan Service Bulletin CAB88-14, dated April 8, 1988.

(c) Airplanes may be flown in accordance with FAR 21.197 to a location where this AD may be accomplished.

(d) An alternate method of compliance or adjustment of the compliance time which provides an equivalent level of safety, may be approved by the Manager, Wichita Aircraft Certification Office, FAA, 1801 Aircraft Road, Room 100, Wichita, Kansas 67209.

**Note.**—The request should be forwarded through an FAA Maintenance Inspector, who may add comments and then send it to the Manager, Wichita Aircraft Certification Office.

All persons affected by this directive may obtain copies of the document referred to herein upon request to the Cessna Aircraft Company, P.O. Box 7704, Wichita, Kansas 67277; or may examine this document at the FAA, Central Region, Office of the Assistant Chief Counsel, Room 1558, 601 East 12th Street, Kansas City, Missouri 64106.

This amendment becomes effective on March 23, 1990.

Issued in Kansas City, Missouri, on February 6, 1990.

Don C. Jacobsen,

*Acting Manager, Small Airplanes Directorate, Aircraft Certification Service.*

[FR Doc. 90-3666 Filed 2-15-90; 8:45 am]

BILLING CODE 4910-13-M

#### 14 CFR Part 39

[Docket No. 86-ANE-34; Amdt. 39-6296]

**Airworthiness Directives; Pratt & Whitney (PW) JT9D-7R4D, -7R4D1, -7R4E, -7R4E1, -7R4E4, -7R4G2, and -7R4H1 Series Turbofan Engines**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This amendment amends an existing airworthiness directive (AD) which requires the installation of containment shields in the fan case assembly and stronger material B-flange

bolts on certain PW JT9D-7R4 turbofan engines, prior to December 31, 1990. The AD is needed to prevent fragments of a failed fan blade from penetrating the fan case assembly which could result in damage to the aircraft.

**DATES:** Effective March 23, 1990.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of March 23, 1990.

**Compliance:** As indicated in the body of the AD.

**ADDRESSES:** The applicable service bulletins (SB) may be obtained from Pratt & Whitney, Publications Department, P.O. Box 611, Middletown, Connecticut 06457, or may be examined in the Regional Rules Docket, Room 311, Office of the Assistant Chief Counsel, Federal Aviation Administration, New England Region, 12 New England Executive Park, Burlington, Massachusetts 01803.

**FOR FURTHER INFORMATION CONTACT:** Diane M. Cook, Engine Certification Branch, ANE-142, Engine Certification Office, Engine and Propeller Directorate, Aircraft Certification Service, Federal Aviation Administration, 12 New England Executive Park, Burlington, Massachusetts 01803; telephone (617) 273-7082.

**SUPPLEMENTARY INFORMATION:** A proposal to amend part 39 of the Federal Aviation Regulations (FAR) to include an AD which requires the installation of containment shields in the fan case assembly and stronger material B-flange bolts on certain PW JT9D-7R4 turbofan engines, prior to December 31, 1990, was published in the *Federal Register* on August 17, 1988 (53 FR 31015).

The proposal was prompted by a need for an alternative method for the installation of fan blade containment hardware and to clarify the compliance requirements of the existing AD. On October 9, 1987, Amendment 39-5755 was issued requiring installation of containment shields in the fan case assembly of JT9D-7R4 series engines in accordance with the applicable PW SB JT9D-7R4-72-311, Revision 2, dated August 19, 1987, or PW SB JT9D-7R4-312, Revision 2, dated June 26, 1987. The AD was necessary to prevent uncontained blade fragment penetration of the fan case assembly in the event of a blade failure. Field experience and analysis indicated that energy of a failed fan blade may have the required force to penetrate the fan case assembly forward of the B-flange.

Additional data gathered by the FAA, since issuance of AD 87-23-05, has shown that an interference problem can

occur on JT9D-7R4D, -7R4D1, -7R4E, -7R4E1, -7R4E4, and -7R4H1 series engines during installation of containment shields under adverse tolerance conditions when installed in accordance with PW SB JT9D-7R4-72-312, Revision 2, dated June 26, 1987.

The proposed amendment would have allowed an optional procedure in accordance with PW SB JT9D-7R4-72-312, Revision 4, dated July 8, 1988, if an interference problem occurs.

Interference between the front containment shield retaining bolts, Part Number (P/N) 1A7544, and the fan case inner diameter (ID) flange may exist. Additional washers, P/N MS9320-10, may be installed on the forward side of B-flange to provide bolt to flange clearance. Also, adverse tolerance stack-up between the four bolts, P/N MS9209-16, and the mating B-flange nuts may result in an insufficient bolt thread engagement on some engines. If sufficient bolt thread engagement occurs, bolts MS9209-17, MS9209-18, or MS9209-19, may be used, provided there is no interference with adjacent hardware.

It was also determined that in addition to PWA 36003 adhesive and PR1422 Class A polysulfide sealant as specified in PW SB JT9D-7R4-72-311, Revision 2, dated August 19, 1987, and PW SB JT9D-7R4-312, Revision 2, dated June 26, 1987, an additional alternative, PR1422 Class B polysulfide sealant may be used in attaching the containment ring segments in accordance with PW SB JT9D-7R4-72-311, Revision 3, dated February 19, 1988, and PW SB JT9D-7R4-72-312, Revision 4, dated July 8, 1988.

Additionally, the FAA determined that clarification of paragraph (b)(1) of AD 87-23-05 was required to specify containment shield and fan case compatibility for the JT9D-7R4D, -7R4D1, -7R4E, -7R4E1, -7R4E4, and -7R4H1 series engines. The installation of the applicable shield to the fan case assembly depends upon the material of the fan case. For titanium cases, the applicable shield to use is P/N 802096; for steel cases, use P/N 802095.

Since this condition is likely to exist or develop on other engines of the same type design, this AD amends Amendment 39-5755 (52 FR 41704; October 30, 1987), AD 87-23-05, by allowing an alternative procedure in the incorporation of the containment shields.

Interested persons have been afforded an opportunity to participate in the making of this amendment.

One comment was received concerning the proposed amendment.

The commenter requested that the proposal include the shorter bolt, P/N 803930, which would also eliminate a washer to correct an interference with a rib in the fan exit case. This bolt was introduced by a PW major engineering change which was FAA approved. Since the close of the comment period, PW SB JT9D-7R4-72-312, Revision 5, dated March 31, 1989, has been issued which adds bolt, P/N 803930, as a preferred replacement bolt, P/N MS9209, while still permitting bolt, P/N 1A7544, as a replacement for bolts, P/N MS9209-22. In light of the comment received, the FAA will require incorporation of the containment shield in the fan case assembly in accordance with PW SB JT9D-7R4-72-312, Revision 5, dated March 31, 1989. Except for this change and minor editorial changes made for clarity, this amendment is adopted as proposed.

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The FAA has determined that this regulation involves approximately 619 engines, and will cost approximately \$840.00 per engine. Therefore, I certify that this action (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal; and (4) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

#### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference.

#### Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration (FAA) amends part 39 of the Federal Aviation Regulations (FAR) as follows:

#### PART 39—[AMENDED]

1. The authority citation for part 39 continues to read as follows:

**Authority:** 49 U.S.C. 1354(a), 1421 and 4123  
49 U.S.C. 106(g) (Revised Pub. L. 97-449.  
January 12, 1983); and 14 CFR 11.89.

#### § 39.13 [Amended]

2. Section 39.13 is amended by amending Amendment 39-5755 (52 FR 41704; October 30, 1987), AD 87-23-05, as follows:

The amendment is restated in its entirety for clarity.

**Pratt & Whitney:** Applies to Pratt & Whitney (PW) JT9D-7R4D, -7R4D1, -7R4E, -7R4E1, -7R4E4, -7R4G2, and -7R4H1 series turbofan engines.

Compliance is required as indicated, unless already accomplished.

To prevent fan blade fragment penetration of the fan case assembly, accomplish the following prior to December 31, 1990:

(a) Modify and reidentify JT9D-7R4G2 series turbofan engines in accordance with PW Service Bulletin (SB) JT9-7R4-72-311, Revision 3, dated February 19, 1988, as follows:

(1) Modify fan case assembly by installing shield, Part Number (P/N) 802094.

(2) Modify outer front fan exit case assembly (fan exit case and vane assembly), by installing ring segments, P/N 803264-01, 803265-01, and 802448.

(3) Reidentify the modified fan case assembly, outer front fan exit case assembly, and the fan exit case and vane assembly.

(b) Modify and reidentify JT9D-7R4D, -7R4D1, -7R4E, -7R4E1, -7R4E4, and -7R4H1 series turbofan engines in accordance with PW SB JT9D-7R4-72-312, Revision 5, dated March 31, 1989, as follows:

(1) Modify fan case assembly by installing shield, P/N 802095, on engines with steel fan case assemblies and shield, P/N 802096, on engines with titanium fan case assemblies.

(2) Modify outer front fan exit case assembly, or detail of fan exit case and vane assembly, and install ring segments, P/N 803261-01, 803262-01, and 802447.

(3) Reidentify the modified fan case assembly, the outer front fan exit case assembly, and the fan exit case and vane assembly.

(c) Aircraft may be ferried in accordance with the provisions of FAR 21.197 and 21.199 to a base where the AD can be accomplished.

(d) An alternate method of compliance or adjustment of the compliance time which provides an equivalent level of safety, submitted through an FAA Airworthiness Inspector, may be approved by the Manager, Engine Certification Office, Engine and Propeller Directorate, Aircraft Certification Service, 12 New England Executive Park, Burlington, Massachusetts 01803.

The modification and reidentification of the fan case assembly, outer front fan exit case assembly, and the fan exit case and vane assembly shall be done in accordance with PW SB JT9D-7R4-72-311, Revision 3, dated February 19, 1988 [pages 1, 7, 9-12, 17, 21 and 24, Revision 3, dated February 19, 1988; [pages 2-6, 8, 13-16, 18-20, 22, and 23, Revision 2, dated August 19, 1987]; or PW SB JT9D-7R4-72-312, Revision 5, dated March 31, 1989 [pages 1, 3, 7-18, Revision 5, dated March 31, 1989; page 2, Revision 2, dated June

26, 1987; page 4, Revision 5, dated February 9, 1987; and page 6, Original issue, dated January 19, 1987]. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 522(a) and 1 CFR Part 51. Copies may be obtained from Pratt & Whitney, Publications Department, P.O. 611, Middletown, Connecticut 06457. Copies may be inspected at the Regional Rules Docket, Office of the Assistant Chief Counsel, Federal Aviation Administration, New England Region, 12 New England Executive Park, Room 311, Burlington, Massachusetts 01803, or at the Office of the Federal Register, 1100 L Street, NW, Room 8301, Washington, DC 20591.

This amendment becomes effective on March 23, 1990.

Issued in Burlington, Massachusetts, on August 3, 1989.

**Arthur J. Pidgeon,**  
*Acting Manager, Engine and Propeller Directorate, Aircraft Certification Service.*

**Note.**—This document was received by the Office of the Federal Register February 13, 1990.

[FR Doc. 90-3664 Filed 2-15-90; 8:45 am]

BILLING CODE 4910-13-M

#### 14 CFR Part 71

##### [Airspace Docket No. 89-AWP-1]

#### Alteration of VOR Federal Airway V-562; Arizona

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This amendment alters the description of VOR Federal Airway V-562 between Drake, AZ, and Salt River, AZ. This alteration will provide an additional route to the Phoenix terminal area. This action will aid in improving the traffic flow for aircraft arriving at airports within the Phoenix terminal area.

**EFFECTIVE DATE:** 0901 U.T.C., May 3, 1990.

**FOR FURTHER INFORMATION CONTACT:** Alton Scott, Airspace Branch (ATO-240), Airspace-Rules and Aeronautical Information Division, Air Traffic Operations Service, Federal Aviation Administration, 800 Independence Avenue, SW, Washington, DC 20591; telephone: (202) 267-9252.

#### SUPPLEMENTARY INFORMATION:

##### History

On August 15, 1989, the FAA proposed to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) to alter the description of VOR Federal Airway V-562 between Drake, AZ, and Salt River,

AZ (54 FR 33579). Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received. Except for editorial changes, this amendment is the same as that proposed in the notice. Section 71.123 of part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6F dated January 2, 1990.

#### The Rule

This amendment to part 71 of the Federal Aviation Regulations amends VOR Federal Airway V-562 between Drake, AZ, and Salt River, AZ. This alteration will provide an additional route to the Phoenix terminal area. This action will aid in improving the traffic flow for aircraft at airports within the Phoenix terminal area.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

#### List of Subjects in 14 CFR Part 71

Aviation safety, VOR federal airways.

#### Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, part 71 of the Federal Aviation Regulations (14 CFR part 71) is amended, as follows:

#### PART 71—DESIGNATION OF FEDERAL AIRWAYS, AREA LOW ROUTES, CONTROLLED AIRSPACE, AND REPORTING POINTS

1. The authority citation for part 71 continues to read as follows:

**Authority:** 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

#### § 71.123 [Amended]

2. § 71.123 is amended as follows:

#### V-562 [Amended]

By removing the words "From Drake, AZ;" and substituting the words "From Salt River, AZ; via INT Salt River 006" and Drake, AZ, 131° radials; Drake;"

Issued in Washington, DC, on Feb. 2, 1990.

Jerry W. Ball,

*Acting Manager, Airspace-Rules and Aeronautical Information Division.*

[FR Doc. 90-3668 Filed 2-15-90; 8:45 am]

BILLING CODE 4910-13-M

action will extend the Los Alamitos Control Zone to encompass the radius area over Meadowlark Airport.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

#### List of Subjects in 14 CFR Part 71

Aviation safety, Control zones.

#### Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, part 71 of the Federal Aviation Regulations (14 CFR part 71) is amended, as follows:

#### PART 71—DESIGNATION OF FEDERAL AIRWAYS, AREA LOW ROUTES, CONTROLLED AIRSPACE, AND REPORTING POINTS

1. The authority citation for part 71 continues to read as follows:

**Authority:** 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

#### § 71.171 [Amended]

2. Section 71.171 is amended as follows:

#### Los Alamitos AAF, CA [Revised]

Within a 5-mile radius of Los Alamitos Armed Forces Reserve Center (lat. 33°47'30"N., long. 118°02'50"W). Excluding that portion within the Long Beach, CA, Control Zone. This control zone is effective during specific times and dates established in advance by a Notice to Airmen. The effective date and time thereafter will be continuously published in the *Airport/Facility Directory*.

Issued in Los Angeles, California, on January 26, 1990.

Jacqueline L. Smith,

*Manager, Air Traffic Division, Western-Pacific Region.*

[FR Doc. 90-3667 Filed 2-15-90; 8:45 am]

BILLING CODE 4910-13-M

#### History

On December 11, 1989, the FAA proposed to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) to revise the description of the Los Alamitos AAF Control Zone, CA (54 FR 50768). Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received. Section 171 of part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6F dated January 2, 1990.

#### The Rule

This amendment to part 71 of the Federal Aviation Regulations revises the description of the Los Alamitos AAF Control Zone, CA. The intended effect is to eliminate the control zone cutout for Meadowlark Airport. Meadowlark Airport is now permanently closed. This

**14 CFR Part 95****[Docket No. 26127; Admt. No. 355]****IFR Altitudes; Miscellaneous Amendments****AGENCY:** Federal Aviation Administration (FAA), DOT.**ACTION:** Final rule.

**SUMMARY:** This amendment adopts miscellaneous amendments to the required IFR (instrument flight rules) altitudes and changeover points for certain Federal airways, jet routes, or direct routes for which a minimum or maximum en route authorized IFR altitude is prescribed. These regulatory actions are needed because of changes occurring in the National Airspace System. These changes are designed to provide for the safe and efficient use of the navigable airspace under instrument conditions in the affected areas.

**EFFECTIVE DATES:** March 8, 1990.

**FOR FURTHER INFORMATION CONTACT:** Paul J. Best, Flight Procedures Standards Branch (AFS-420), Technical Programs Division, Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267-8277.

**SUPPLEMENTARY INFORMATION:** This amendment to part 95 of the Federal Aviation Regulations (14 CFR part 95) amends, suspends, or revokes IFR altitudes governing the operation of all

aircraft in flight over a specified route or any portion of that route, as well as the changeover points (COPs) for Federal airways, jet routes, or direct routes as prescribed in part 95. The specified IFR altitudes, when used in conjunction with the prescribed changeover points for those routes, ensure navigation aid coverage that is adequate for safe flight operations and free of frequency interference. The reasons and circumstances which create the need for this amendment involve matters of flight safety, operational efficiency in the National Airspace System, and are related to published aeronautical charts that are essential to the user and provide for the safe and efficient use of the navigable airspace. In addition, those various reasons or circumstances require making this amendment effective before the next scheduled charting and publication date of the flight information to assure its timely availability to the user. The effective date of this amendment reflects those considerations. In view of the close and immediate relationship between these regulatory changes and safety in air commerce, I find that notice and public procedure before adopting this amendment are unnecessary, impracticable, and contrary to the public interest and that good cause exists for making the amendment effective in less than 30 days.

The FAA has determined that this regulation only involves an established body of technical regulations for which

frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

**List of Subjects in 14 CFR Part 95****Aircraft, Airspace.**

Issued in Washington, DC on February 1, 1990.

**Daniel C. Beaudette,  
Director, Flight Standards Service.****Adoption of the Amendment**

Accordingly, pursuant to the authority delegated to me by the Administrator, part 95 of the Federal Aviation Regulations (14 CFR part 95) is amended as follows effective at 0901 CMT:

**PART 95—[AMENDED]**

1. The authority citation for part 95 continues to read as follows:

**Authority:** 49 U.S.C. 1348, 1354, and 1510; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.49(b)(2).

2. Part 95 is amended as follows:

**BILLING CODE 4910-13-M**



**Coast Guard****33 CFR Part 117**

[CGD7-90-02]

**Temporary Drawbridge Operation Regulations; Indian Creek, FL****AGENCY:** Coast Guard, DOT.**ACTION:** Temporary rule.

**SUMMARY:** The Coast Guard is temporarily changing the regulations governing the 63rd Street drawbridge at Miami Beach, Florida, by revoking the existing regulations and returning the drawbridge to openings on signal. This temporary change is being made to ease the burden on navigation and to further evaluate whether the existing regulations should be permanently removed.

**DATES:** These temporary regulations become effective February 1, 1990 and terminate on April 1, 1990. Comments must be received within this 60-day temporary regulation period.

**ADDRESSES:** Comments regarding this temporary change should be mailed to Commander (oan), Seventh Coast Guard District, 909 SE First Avenue, Miami, FL 33131-3050. Any comments received will be available for inspection and copying in the office of the Bridge Administrator located in room 408 at Brickell Plaza Federal Building, 909 SE First Avenue, Miami, FL. Documents and comments concerning this regulation may be inspected Monday through Friday between 7:30 am and 4 pm.

**FOR FURTHER INFORMATION CONTACT:** Mr. Brodie Rich, (305) 536-4103.

**SUPPLEMENTARY INFORMATION:** Interested parties submitting written views, comments, data, or arguments should include their names and addresses, identify the bridge, and give reasons for regulation.

**Drafting Information**

The drafters of this notice are Mr. Brodie Rich, Bridge Administration Specialist, project officer, and Lieutenant Commander D. G. Diskman, project attorney.

**Discussions of Temporary Regulations**

The 63rd Street drawbridge presently opens on signal, except that, from December 1 through April 15 from 11 a.m. to 6 p.m., the draw need be opened only on the hour. Public vessels of the United States, regularly scheduled cruise vessels, and vessels in an emergency involving life or property shall be passed at any time.

This change is intended to return the drawbridge to openings on signal since

vehicular traffic has decreased in recent years and the number of vessels using this waterway that require the draw to open for passage is considered to be minimal. Revocation of the existing seasonal regulations has been requested by navigational interests on the waterway. Because this is a temporary regulation, it will not appear in the Code of Federal Regulations.

**Economic Assessment and Certification**

These temporary regulations are considered to be non-major under Executive Order 12291 on Federal Regulation and non-significant under the Department of Transportation regulatory policies and procedures (44 FR 11034; February 28, 1979).

Since there is no economic impact, a full regulatory evaluation is unnecessary. Accordingly the Coast Guard certifies that, if adopted, it will not have a significant impact on a substantial number of small entities.

**List of Subjects in 33 CFR Part 117**

Bridges.

**Regulations**

In consideration of the foregoing, part 117 of title 33 of the Code of Federal Regulations (CFR) is amended for the period of February 1, 1990 to April 1, 1990. Because this is a temporary rule, the following amendments will not be codified in the CFR.

**PART 117—DRAWBRIDGE OPERATION REGULATIONS**

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; CFR 1.46; 33 CFR 1.05-1(g).

**§ 117.293 [Suspended]**

2. Section 117.293 is suspended.

Dated: February 1, 1990.

Martin H. Daniell,

Rear Admiral, U.S. Coast Guard, Commander, Seventh Coast Guard District.

[FR Doc. 90-3690 Filed 2-15-90; 8:45 am]

BILLING CODE 4810-14-M

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 81**

[FRL-3724-2; TN-056]

**Designation of Areas for Air Quality Planning Purposes, Tennessee; Redesignation of an Ozone Nonattainment Area**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is today granting the request by Tennessee to redesignate Roane County from nonattainment to attainment for ozone. The redesignation of this county to attainment is based on three years of ambient monitoring data showing a calculated expected exceedance of less than 1.0 per year and on implementation EPA-approved control strategies.

**EFFECTIVE DATE:** The action will become effective March 19, 1990.

**ADDRESSES:** Copies of the materials submitted by Tennessee may be examined during normal business hours at the following locations:

Environmental Protection Agency, Region IV, Air Programs Branch, 345 Courtland Street NE, Atlanta, Georgia 30365.

Division of Air Pollution Control, Tennessee Department of Health and Environment, Customs House 4th Floor, 701 Broadway, Nashville, Tennessee 37219-5403.

**FOR FURTHER INFORMATION CONTACT:** Diane T. Altsman, Air Programs Branch, EPA Region IV, at the above address and telephone number (404) 347-2864 or FTS 257-2864.

**SUPPLEMENTARY INFORMATION:** On March 3, 1978 (43 FR 8962), EPA designated Roane County as nonattainment for ozone. This designation was based on ambient air quality monitoring data which indicated that Roane County had experienced oxidant violations. Several other areas in Tennessee were also designated nonattainment for ozone and the State was therefore required to revise its State Implementation Plan (SIP) for ozone. Tennessee drafted and adopted statewide regulations for controlling Volatile Organic Compound (VOC) emissions from stationary sources. Through the Federal Motor Vehicle Control Program and through implementation of Group I and Group II VOC regulations, Tennessee demonstrated attainment of the ozone standard in Roane County. EPA approved Tennessee's ozone SIP on August 13, 1980, (45 FR 53813).

Tennessee has requested that EPA change the attainment status of Roane County from nonattainment to attainment for ozone. In order to redesignate a nonattainment area, EPA policy requires that the most recent three years of ozone data show an expected exceedance calculation of less than or equal to 1.0 per year. In the event that three years of ozone data are not available, the most recent eight

quarters of quality assured ambient air data may suffice provided that no exceedances have occurred. In addition, the data must be accompanied by a demonstration of implementation of an EPA-approved control strategy.

Tennessee's request for redesignation is based on three years of ambient ozone data. Specifically, the most recent three years of air quality data (1985, 1986, and 1987 for Roane County) show the number of expected exceedances to be less than or equal to 1.0 per year. The Roane County Site was a special purpose monitoring site. Following the conclusion of the site's monitoring purpose, the site was shut down, thereby rendering no further ambient air quality data since 1987. Additionally, the sources in Roane County to which the VOC regulations apply are fully implementing the EPA-approved control strategy.

For a more detailed discussion, please refer to the Technical Support Document which is available for inspection at the EPA Region IV office.

On July 5, 1988 (53 FR 25178), EPA proposed to approve the request to redesignate Roane County to attainment for ozone. At that time the public was invited to submit written comments on the proposed action. However, no comments were received.

#### Final Action

Therefore, on the basis of the most recent three years of air quality data showing attainment and evidence of an implemented EPA-approved control strategy, EPA today redesignates Roane County from ozone nonattainment to attainment.

Today's action is contingent upon the State and/or county maintaining an adequate ozone ambient air quality monitoring network and continuing full implementation of their nonattainment plan. Under the reasoning of *Bethlehem Steel Corp vs. EPA*, 723 F. 2d 1304 (7th Cir. 1983), EPA believes that it may not have the authority to redesignate an area to nonattainment without first receiving a request to do so from the affected State. Therefore EPA anticipates that should violations of the ozone NAAQS occur in the future, the State will request that EPA redesignate the area nonattainment. Also, this redesignation does not in any way relieve sources from their obligation to meet all applicable requirements of the approved ozone nonattainment plans (SIPs), nor does it authorize the State and/or the county to delete or relax RACT emission limiting regulations. Changes to ozone SIP VOC regulations rendering them less stringent than those contained in the EPA approved plan

cannot be made unless a revised plan for attainment and maintenance is submitted to and approved by EPA. Unauthorized relaxations, deletions, and changes could result in both a finding of nonimplementation (section 173(b) of the Clean Air Act) and in a SIP deficiency call made pursuant to section 110(a)(2)(H) of the Clean Air Act.

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by (60 days from date of publication). This action may not be challenged later in proceedings to enforce its requirements. (See 307(b)(2).)

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

#### List of Subjects in 40 CFR Part 81

Air pollution control, National parks, Wilderness areas.

Dated: February 8, 1990.

William K. Reilly,

*Administrator.*

Part 81 of chapter I, title 40, Code of Federal Regulations, is amended as follows:

#### Subpart C—Section 107 Attainment Status Designations

#### PART 81—[AMENDED]

1. The authority citation for part 81 continues to read as follows:

Authority: 42 U.S.C. 7401-7642.

2. Section 81.343 is amended by removing from the attainment status designation table for ozone ( $O_3$ ) the entry for Roane County. As revised, the table reads as follows:

#### § 81.343 Tennessee.

\* \* \* \* \*

#### TENNESSEE—OZONE ( $O_3$ )

Designated area	Does not meet primary standards	Cannot be classified or better than national standards *
Nashville Area—Davidson, Sumner, Rutherford, Wilson, and Williamson Counties.	X <sup>1</sup>	
Shelby County..... Rest of State.....	X <sup>1</sup>	X

<sup>1</sup> EPA designation replaces State designation.

\* Designations of "Cannot be classified or better than national standards" were reaffirmed on July 23, 1982.

[FR Doc. 90-3727 Filed 2-15-90; 8:45 am]  
BILLING CODE 6560-50-M

#### 40 CFR Part 271

[FRL-3725-3]

#### Kentucky; Schedule of Compliance for Modification of Kentucky's Hazardous Waste Program

AGENCY: Environmental Protection Agency, Region IV.

ACTION: Notice of Kentucky's compliance schedule to adopt program modifications.

SUMMARY: On September 22, 1986 EPA promulgated amendments to the deadlines for States to be placed on a compliance schedule to adopt necessary program modifications. EPA is today publishing a compliance schedule for Kentucky to modify its program in accordance with § 271.21(g) to adopt the Federal program modifications.

#### FOR FURTHER INFORMATION CONTACT:

Patricia Herbert, Waste Planning Section, RCRA Branch, Waste Management Division, U.S. Environmental Protection Agency, 345 Courtland Street NE, Atlanta, Georgia 30365, (404) 347-3016.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

Final authorization to implement the Federal hazardous waste program within the State is granted by EPA if the Agency finds that the State program (1) is "equivalent" to the Federal program, (2) is "consistent" with the Federal program and other State programs, and (3) provides for adequate enforcement (Section 3006(b), 42 U.S.C. 6226(b)). EPA regulations for final authorization appear at 40 CFR 271.1-271.24. In order to retain authorization, a State must revise its program to adopt new Federal requirements by the cluster deadlines and procedures specified in 40 CFR 271.21. See 51 FR 33712, September 22, 1986 for a complete discussion of these procedures and deadlines.

##### B. Kentucky

Kentucky initially received final authorization for the RCRA Base Program on January 31, 1985 (50 FR 2550, January 17, 1985). Kentucky received final authorization for Radioactive Mixed Waste equivalence on December 19, 1989 (53 FR 41164) and for non-HSWA Cluster II equivalence on March 20, 1989. On November 15, 1988,

Kentucky submitted a complete, final program revision application for approval for Federal regulations promulgated between January 1, 1983 and June 30, 1985, known as requirements prior to non-HSWA Cluster I and non-HSWA Cluster II. This application included Kentucky's demonstration of Availability of Information equivalence with RCRA section 3006(f) Freedom of Information requirements. On November 23, 1988, Kentucky submitted a complete final program revision application for approval for Federal regulations promulgated between July 1, 1986 and June 30, 1987, known as non-HSWA Cluster III. Kentucky received final authorization for Requirements Prior to non-HSWA Cluster I, Non-HSWA Cluster III and Availability of Information on May 15, 1989 (54 FR 20849). Today EPA is publishing a compliance schedule for Kentucky to obtain program revisions for the Federal program requirements for Federal regulations promulgated between July 1, 1987 and June 30, 1988 known as Non-HSWA Cluster IV.

The State has agreed to obtain the needed program revisions according to the following schedule or earlier if practicable.

Date	Interim milestones
April 15, 1990 .....	Regulations drafted.
April 15, 1990 .....	Draft regulations to Kentucky Environmental Quality Commission (EQC) and Environmental Protection Agency for review.
May 15, 1990.....	Regulations to Legislative Research Commission.
May 15, 1990.....	Public Notice published.
June 1, 1990.....	Regulations published in Kentucky Administrative Register.
June 25, 1990.....	Public participation by public hearing.
June 25, 1990.....	Comments due from EPA.
July 10, 1990.....	Statement of Consideration.
August 1, 1990.....	Regulations republished in Kentucky Administrative Register.

Date	Interim milestones
September 1, 1990 .....	Through Administrative Review and Agriculture and Natural Resources sub-committees.
September 15, 1990....	Effective date of regulations.

Kentucky expects to submit an application to EPA for authorization of the above mentioned program revisions by January 1, 1991.

#### Authority

This notice is issued under the authority of sections 2002(a), 3006, and 7004(b) of the Solid Waste Disposal Act, as amended by the RCRA of 1976, as amended, 42 U.S.C. 6912(a), 6926, and 6974(B).

Dated: February 5, 1990.

**Joe R. Franzmathes,**  
Acting Regional Administrator.

[FR Doc. 90-3728 Filed 2-15-90; 8:45 am]

BILLING CODE 6560-50-M

Runaway and Homeless Youth Program to clarify the matching requirement for grants awarded under the program and to make technical and editorial changes to reflect new statutory language. Since no substantive comments were received, no changes will be made to the Final Rule as published on May 15, 1989.

**EFFECTIVE DATE:** May 15, 1990.

**FOR FURTHER INFORMATION CONTACT:**  
Pamela A. Johnson (202) 245-0043.

**SUPPLEMENTARY INFORMATION:** On May 15, 1989, the Department published a final rule (54 FR 20853) with a 60 day comment period amending 45 CFR part 1351. One comment was received which cited an incorrect statement in the preamble to the final rule. The statement made in the first sentence under Part III, C. *The 1988 Amendments* (54 FR 20854) should have read, "The 1988 amendments provide for the implementation of transitional living services for homeless youth when the Title III appropriation level for such fiscal year to carry out Part A of this title exceeds \$26.9 million; \* \* \*

(Catalog of Federal Domestic Assistance Program Number 13.623, Runaway and Homeless Youth program)

Dated: November 30, 1989.

**Mary Sheila Gall,**  
Assistant Secretary for Human Development Services.

Approved: February 9, 1990.

**Louis W. Sullivan,**  
Secretary.

[FR Doc. 90-3627 Filed 2-15-90; 8:45 am]

BILLING CODE 4130-01-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Office of Human Development Services

#### 45 CFR Part 1351

#### RIN 0980-AA11

### Runaway and Homeless Youth Program

**AGENCY:** Administration for Children, Youth and Families, (ACYF) Office of Human Development Services, (OHDS).

**ACTION:** Confirmation of final rule.

**SUMMARY:** The Administration for Children, Youth and Families is hereby advising the public that no substantive comments were received in response to the Final Rule with Comment Period that amended 45 CFR part 1351, published May 15, 1989 (54 FR 20853). The final rule amended the regulations for the

## Proposed Rules

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

### DEPARTMENT OF AGRICULTURE

#### Agricultural Marketing Service

#### 7 CFR Part 925

[Docket No. FV-90-126]

#### Expenses and Assessment Rate for Marketing Order No. 925

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would authorize expenditures and establish an assessment rate under Marketing Order 925 for the 1990 fiscal period.

Authorization of this budget would allow the California Desert Grape Administrative Committee (committee) to incur expenses that are reasonable and necessary to administer the program. Funds to administer this program would be derived from assessments on handlers.

**DATES:** Comments must be received by February 26, 1990.

**ADDRESSES:** Interested persons are invited to submit written comments concerning this proposal. Comments must be sent in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2525-S, Washington, DC 20090-6456. Comments should reference the docket number and the date and page number of this issue of the FEDERAL REGISTER and will be available for public inspection in the Office of the Docket Clerk during regular business hours.

**FOR FURTHER INFORMATION CONTACT:** Kenneth G. Johnson, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2525-S, Washington, DC 20090-6456, telephone 202-447-5331.

**SUPPLEMENTARY INFORMATION:** This rule is proposed under Marketing Agreement No. 925 and Marketing Order No. 925 (7 CFR part 925) regulating the handling of grapes grown in a designated area of southeastern California. The marketing

agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the Act.

This proposed rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this proposed rule on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 20 handlers of California desert grapes under this marketing order, and approximately 90 desert grape producers. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.2) as those having annual receipts of less than \$500,000, and small agricultural service firms are defined as those whose annual receipts are less than \$3,500,000. The majority of the handlers and producers may be classified as small entities.

The marketing order requires that the assessment rate for a particular fiscal period shall apply to all assessable grapes handled from the beginning of such period. An annual budget of expenses is prepared by the committee and submitted to the Department of Agriculture for approval. The members of the committee are handlers and producers of grapes. They are familiar with the committee's needs and with the costs for goods, services, and personnel in their local area and are thus in a position to formulate an appropriate budget. The budget was formulated and discussed in a public meeting. Thus, all directly affected persons have had an opportunity to participate and provide input.

The assessment rate recommended by the committee is derived by dividing anticipated expenses by expected

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shipments of grapes. Because that rate is applied to actual shipments, it must be established at a rate which will produce sufficient income to pay the committee's expected expenses. A recommended budget and rate of assessment is usually acted upon by the committee before the season starts, and expenses are incurred on a continuous basis. Therefore, budget and assessment rate approval must be expedited so that the committee will have funds to pay its expenses.

The committee met on January 17, 1990, and unanimously recommended a 1990 budget of \$27,825. The proposed budget is \$20,175 less than last year's due decreases in expenditures for the committee manager's salary and vehicle expense, payroll taxes, rent and contingency reserve. The committee also recommended an assessment rate of \$0.003 per lug. This rate, when applied to anticipated shipments of 8,000,000 lugs would yield \$24,000 in assessment revenue which, added to \$3,825 from interest income and reserve funds, would be adequate to cover budgeted expenses.

While this proposed action would impose some additional costs on handlers, the costs are in the form of uniform assessments on all handlers. Some of the additional costs may be passed on to producers. However, these costs would be significantly offset by the benefits derived from the operation of the marketing order. Therefore, the Administrator of the AMS has determined that this action would not have a significant economic impact on a substantial number of small entities.

Based on the foregoing, it is found and determined that a comment period of less than 30 days is appropriate because the budget and assessment rate approval for this program needs to be expedited. The committee needs to have sufficient funds to pay its expenses which are incurred on a continuous basis.

### List of Subjects in 7 CFR Parts 925

Grapes, Marketing agreements, Reporting and recordkeeping requirements for the reasons set forth in the preamble, it is proposed that 7 CFR part 925 be amended as follows:

**PART 925—GRAPES GROWN IN A DESIGNATED AREA OF SOUTHEASTERN CALIFORNIA**

1. The authority citation for 7 CFR part 925 continues to read as follows:

Authority: Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674.

2. A new § 925.209 is added to read as follows:

**§ 925.209 Expenses and assessment rate.**

Expenses of \$27,825 by the California Desert Grape Administrative Committee are authorized, and an assessment rate of \$0.003 per 22-pound container of grapes is established for the fiscal period ending December 31, 1990. Unexpended funds may be carried over as a reserve.

Dated: February 13, 1990.

**Robert C. Keeney,**

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 90-3702 Filed 2-15-90; 8:45 am]

BILLING CODE 3410-02-M

**NUCLEAR REGULATORY COMMISSION****10 CFR Parts 50 and 70**

[Docket Nos. PRM-50-31, PRM-50-45, and PRM-50-46]

**Emergency Preparedness at Nuclear Power Plants; Denial of Petitions for Rulemaking**

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Denial of petitions for rulemaking.

**SUMMARY:** The Nuclear Regulatory Commission is denying three petitions for rulemaking concerning emergency preparedness at nuclear power plants. These petitions were submitted by the Citizens Task Force of Chapel Hill, North Carolina; the Department of Attorney General, State of Maine; and an individual, Kenneth G. Sexton, Ph.D. The Citizens Task Force petition (PRM-50-31) requested that (1) the emergency planning zone radius around nuclear power plants be extended from 10 miles to 20 miles, (2) independent radiological monitoring systems operated by local communities be established, and (3) mandatory utility funding of the emergency preparedness efforts of local communities be required. The petition submitted by Mr. Sexton (PRM-50-45) requested that the size of the plume exposure pathway EPZ be determined on a site-specific basis, using the most up-to-date methodologies and that the

size of the EPZ be reevaluated at least every five years. The petition submitted by the State of Maine (PRM-50-46) requested (1) expansion of the emergency planning zone for both plume exposure pathway and for the ingestion pathway; (2) requiring that emergency planning be done before any construction of a nuclear facility is permitted and that the governor or governors of any affected state approve the emergency plans as a precondition to construction; and (3) requiring that offsite emergency preparedness findings be made before any fuel loading or low power operations are permitted.

The Commission considers that these three petitions have a common theme thus warranting simultaneous evaluation. Additionally, the State of Maine formally requested that ". . . the Maine Petition consolidated with the so-called Sexton Petition . . ." In denying the petitions, the Commission concludes that its present regulations on emergency preparedness are adequate to protect public health and safety.

**ADDRESSES:** Copies of all NRC documents are available for public inspection and copying for a fee at the NRC Public Document Room at 2120 L Street NW. (Lower Level), Washington, DC. Copies of NUREG documents may be purchased from the Superintendent of Documents, U.S. Government Printing Office by calling (202) 275-2060 or by writing to the Superintendent of Documents, U.S. Government Printing Office, P.O. Box 37082, Washington, DC 20013-7082. Copies are also available from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:**

**PRM-50-31:** A petition filed before the Commission on December 21, 1981 by the Citizens Task Force of Chapel Hill, NC, requested the Commission to amend its emergency preparedness regulations in 10 CFR part 50, "Domestic Licensing of Production and Utilization Facilities," and part 70, "Domestic Licensing of Special Nuclear Material." The petition requested the Commission to amend the regulations to require that the present 10-mile emergency planning zone (EPZ) radius for nuclear power plants be extended from 10 miles to 20 miles and include any towns bordering on or partially within this EPZ, that towns within the EPZ with a population in excess of 5,000 persons operate their own radiological monitoring equipment, and that utilities be required to finance the emergency preparedness efforts of the towns around the nuclear power plants.

A notice of filing the petition, Docket No. PRM-50-31, was published in the *Federal Register* on March 24, 1982 (47 FR 12639). Public comments were requested by May 24, 1982. The comment period was extended to March 9, 1987 (51 FR 40335; November 6, 1986).

A total of 74 comment letters were received. Twenty-three of the letters were from individuals, of whom 15 favored the petition and eight opposed it. Thirteen letters were from environmental, nuclear, or energy oriented citizen activist groups. Of these, 12 favored the petition and one opposed it. Twenty-nine letters were from utilities, their law firms, or other companies associated with the nuclear industry. All 29 opposed the petition. Seven letters were received from state or local emergency preparedness agencies. All seven opposed the petition. A letter from a political club and a letter from a county commission were received, both favored the petition.

**PRM-50-45:** A petition filed before the Commission on August 6, 1986 by Mr. Kenneth G. Sexton, requested the Commission to amend its emergency preparedness regulations in 10 CFR part 50, "Domestic Licensing of Production and Utilization Facilities." The petition requested the Commission to amend 10 CFR 50.47(c)(2) for nuclear power plants to require that "the plume exposure pathway EPZ for all nuclear power plants shall consist of an area to be determined by the NRC on a site-specific basis, after allowing for review of the determination report by interested parties. The report shall list, describe, and reference all input data and methodologies used and all other factors considered. The NRC shall use methodologies and procedures which are generally accepted as reasonably current and appropriate by recognized professional groups in each supporting field (including the American Meteorology Society (AMS) and Environmental Protection Agency (EPA)). Likewise, best available estimates for model input (such as source terms) shall be used. This distance shall be reevaluated at least every five years, using latest techniques and information, unless petitioned earlier by the NRC, another professional group (such as the EPA or AMS), or the general public. Generally, the models shall be at least as complex and realistic as described in NUREG-0654 for Class B models. Meteorological submodels shall

consider all factors which can have an effect on the impact of the release of radioactive materials to the environment. The exact size and configuration of the EPZ surrounding a particular nuclear power reactor shall be determined in relation to local emergency response needs and capabilities as they are affected by such conditions as power plant specifics (type, power output, age, etc.), local meteorology (including data from both the power plant site and local national weather service), demography, topography, land characteristics, access routes, jurisdictional boundaries, and proximity of seats of local government."

A notice of filing of the petition, Docket No. PRM-50-45, was published in the **Federal Register** on October 6, 1986 (51 FR 35518). Public comments were requested by December 5, 1986.

A total of 314 comment letters were received of which 278 favored the petition and 14 opposed it. Two hundred thirty-five of the letters were from individuals. Four letters were from environmental, nuclear, or energy oriented citizen activist groups. Of these, three favored the petition and one opposed it. Ten letters were from utilities, their law firms, or other companies associated with the nuclear industry. All ten opposed the petition. Seven letters were received from local government emergency preparedness agencies, of whom four favored the petition and three opposed the petition.

**PRM-50-46:** A petition filed before the Commission on October 14, 1986 by the Attorney General, State of Maine, requested the Commission to amend its emergency preparedness regulations in 10 CFR part 50, "Domestic Licensing of Production and Utilization Facilities." The petition requested that the Commission amend 10 CFR 50.47(c)(2) for nuclear power plants to (1) expand both the emergency planning zone for the plume exposure pathway and for the ingestion pathway; (2) require that emergency planning be done before any construction of a nuclear facility is permitted and that the governor or governors of any affected state approve the emergency plans as a precondition to construction; and (3) require that offsite emergency preparedness findings be made before any fuel loading or low power operations are permitted. Subsequently, the State of Maine, Department of the Attorney General, in a letter dated February 13, 1987 requested ". . . that the Maine Petition be consolidated with the so-called Sexton Petition, Docket No. PRM-50-45, 51 Federal Register 35518 (October 6, 1986) . . .".

A notice of filing of the petition, Docket No. PRM-50-46, was published in the **Federal Register** on December 30, 1986 (51 FR 47025). Public comments were requested by March 2, 1987.

A total of 37 comment letters were received. Seven of the letters were from individuals, all favoring the petition. Five letters were from environmental, nuclear, or energy oriented citizen activist groups. Of these, four favored the petition and one opposed it. Twenty-two letters were from utilities and law firms. Of these, four favored the petition and sixteen opposed the petition. One letter was received from a state and favored the petition.

Each of the three petitioners requested, among other things, a fundamental change to the NRC emergency planning regulations that would or could change the size of the plume exposure pathway EPZ. Each petitioner provided a different rationale to support its request and many comment letters surfaced additional reasons to either support or oppose the petitioners requests. Sixteen separate issues have been identified in the petition and comments. Issues 1 through 11 focus on this common theme, to change the size of the EPZ, while addressing different rationales. Issues 12 through 16 focus on emergency planning areas of tangential concern. Each issue with accompanying rationale is fully discussed and evaluated followed by a Commission response to that particular concern.

#### Issue 1. Extend the emergency planning zone radius from 10 miles to 20 miles because the most severe accidents were not adequately considered

The rationale used for expressing the opinion that a 10-mile EPZ is inadequate is that following a core-melt accident which results in an atmospheric release of radiation, large doses of radiation could occur outside the 10-mile radius. The petition filed by the Citizens Task Force of Chapel Hill, NC, quoted the joint NRC-FEMA report NUREG-0654.<sup>1</sup>

On the other hand, for the worst possible accidents, protective actions [evacuation of the population]<sup>2</sup> would need to be taken

<sup>1</sup> NUREG-0654, Rev. 1, Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants, November 1980.

<sup>2</sup> Note that the words in brackets, [evacuation of the population], were added to the quote by one of the petitioners. The words change the meaning intended in NUREG-0654, wherein protective action includes other actions besides evacuation, such as seeking shelter indoors.

outside the planning zones [of 10 miles]. NUREG-0654 Rev. 1 at 11.

The petitioner argued that the size of the EPZ should be based on the worst-case core meltdown accident stating, "It is disturbing that the evacuation preparedness EPZ zone is limited to 10 miles despite the clear recognition that in a worst-case accident, evacuation would need to be taken outside the zone." The petitioner further argued that evacuation should be taken only to avoid "immediate life threatening doses" but other severe adverse health risks as well.

Several commenters supported the idea that the EPZ should be based on the worst-case accident: an accident involving a core-melt, a major breach of containment resulting in an atmospheric release of large amounts of radioactivity especially during adverse weather conditions. These commenters said that people beyond 10 miles were in danger from such an accident. For example, the Union of Concerned Scientists said:

Although the NRC alleged in NUREG-0396<sup>3</sup> that it considered accidents beyond the traditional design basis, the consideration given such accidents was minimal at best.

It is clear that the 10-mile plume EPZ was not directed toward accidents in which the containment fails either concurrently with a core-melt or consequent to a core-melt. It is precisely such accidents which dominate the risks to the public from the operation of nuclear power plants.

Commenters cited large consequences from a severe accident. For example, Pollution and Environmental Problems, Inc., said:

The Reactor Safety Study<sup>4</sup> estimates that a core-melt could cause 48,000 fatalities; 285,000 non-fatal illnesses and 5,000 genetic injuries. These consequences—as bad as they are—assume that most people downwind of an accident within a 45 degree sector extending 25 miles from a plant could be evacuated within a few hours. The NRC requires—only a 10-mile evacuation zone—so it must be assumed that NRC is willing to accept a larger number of deaths and injuries than the Reactor Safety Study assumes.

#### Commission Response to Issue 1

The Commission dealt extensively with the issue of the adequacy of the 10 mile EPZ in the context of severe accidents, in its decision in Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1) CLI-87-12, 26 NRC 383

<sup>3</sup> NUREG-0396, Planning Basis for the Development of State and Local Government Radiological Emergency Response Plans in Support of Light Water Nuclear Power Plants, December 1978.

<sup>4</sup> WASH-1400 (also numbered NUREG-75/0014), Reactor Safety Study, often called the "Rasmussen Report" or WASH-1400," October 1975.

(1987). The discussion in that case summarizes the Commission development of the 10 mile EPZ concept and it is appropriate to quote extensively from it in response to the petitions here. The Commission noted that,

For design-basis/loss-of-coolant accidents (DBA/LOCA), the Report [NUREG-0396] concluded, among other things, that for most plants the 25-rem (thyroid) and 5-rem (whole-body) EPA protective action guides<sup>5</sup> would not be exceeded beyond 10 miles from the plant, even using conservative assumptions and analyses. Report, Appendix I at 4-6. As for serious Class 9 accidents involving core-melt and containment failure, the Report [NUREG-0396] concluded that these protective action guides generally would not be exceeded beyond 10 miles unless the containment failed catastrophically and there was a very large release of radioactive material . . . [and] that even for very large releases, emergency actions such as sheltering or evacuation within 10 miles would result in significant reductions in deaths and early injuries. Id. at 6-7. From a probability standpoint, the Report concluded that the probability of large doses from core-melt accidents drops off substantially at about 10 miles from the reactor. Id. at 37.

Based on these considerations, the Report concluded that:

Emergency response plans should be useful for responding to any accident that would produce offsite doses in excess of the PAGs. This would include the more severe design-basis accidents and the accident spectrum analyzed in [the Reactor Safety Study] RSS. After reviewing the potential consequences associated with these types of accidents, it was the consensus (sic) of the Task Force that emergency plans could be based upon a generic distance out to which predetermined actions would provide dose savings for any such accidents. Beyond this generic distance it was concluded that actions could be taken on an ad hoc basis using the same considerations that went into the initial action determinations.

The Task Force judgment on the extent of the Emergency Planning Zone is derived from the characteristics of design basis and Class 9 accident consequences. Based on the information provided in Appendix I [of NUREG-0396] and the applicable PAGs a radius of about 10 miles was selected for the plume exposure pathway and a radius of about 50 miles was selected for the ingestion exposure pathway as shown in Table 1. Although the radius for the EPZ implies a circular area, the actual shape would depend upon the characteristics of a particular site. The circular or other defined area would be for planning whereas initial response would like involve only a portion of the total area. Report at 16. 26 NRC at 393 (brackets not in the original).

<sup>5</sup> "Protective action guides are units of radiation doses which, if projected to be received by an individual, would warrant protective action." 26 NRC, at 393 N. 18 (1987), citing Manual of Protective Action Guides and Protective Actions for Nuclear Incidents, EPA-520/1-75-001 (September 1975).

A reading of the Report [NUREG-0396] indicates clearly that the margins of safety provided by the recommended 10-mile radius were not calculated in any precise fashion, but were qualitatively found adequate as a matter of judgment. Given the uncertainties in estimations of Class 9 accident probabilities and consequences, there was no other feasible choice in this regard. The EPZ's shape could be somewhat different than the 10-mile circular radius implies, without compromising emergency planning goals. Indeed, the Report [NUREG-0396] is explicit that "judgment . . . will be used in determining the precise size and shape of the EPZs considering local conditions such as demography, topography, and land use characteristics, access routes, local jurisdictional boundaries and arrangements with the nuclear facility operator for notification and response assistance." These are, of course, the considerations later cited in § 50.47(b)(2) with regard to determining the "exact size and configuration" of the EPZ.

Nothing in the Report [NUREG-0396] or in any other material in the emergency planning rulemaking record compels a finding that EPZ adequacy is especially sensitive to where exactly the boundary falls, and any such conclusion would seem to be at odds with the overall thrust of the Report [NUREG-0396]. In particular, the task force's analysis indicates that "adequate protective measures" in the context of emergency planning is not a precisely defined concept. 26 NRC at 394 (brackets not in the original).

The concept of "adequate protective measures" as used in our emergency planning regulations is explained in Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22, 30 (1986), as follows:

This root question cannot be answered without some discussion of what is meant by "adequate protective measures." Our emergency planning regulations are an important part of the regulatory framework for protecting the public health and safety. But they differ in character from most of our siting and engineering design requirements which are directed at achieving or maintaining a minimum level of public safety protection. See, e.g., 10 CFR 100.11. Our emergency planning requirements do not require that an adequate plan achieve a preset minimum radiation dose saving or a minimum evacuation time for the plume exposure pathway emergency planning zone in the event of a serious accident. Rather, they attempt to achieve reasonable and feasible dose reduction under the circumstances; what may be reasonable or feasible for one plant site may not be for another.

As the Commission has made clear:

It is implicit in this concept of "adequate protective measures" that a determination that a particular EPZ size will provide "adequate protective measures" does not in fact mean that emergency planning will eliminate, in every conceivable accident, the possibility of serious harm to the public. If this were actually the criterion, it would be difficult if not impossible to set any a priori

limits to the size of the EPZ or to the scope of required emergency planning. Emergency planning can, however, be expected to reduce any public harm in the event of a serious, but highly unlikely accident.

But the rule clearly was intended to set such limits. Even under the Appeal Board's analysis, the rule amounts to a Commission finding that adequate protection can be provided by an EPZ of limited size, 10 miles in radius, give or take a few miles, but certainly much less than 20.

. . . the proper interpretation of the rule would call for adjustment to the exact size of the EPZ only on the basis of such straightforward administrative considerations as avoiding EPZ boundaries that run through the middle of schools or hospitals, or that arbitrarily carve out small portions of governmental jurisdictions. The goal is merely planning simplicity and avoidance of ambiguity as to the location of the boundaries. With such clarity, plans can be implemented with an understanding as to who is being directed to take particular protective actions. 26 NRC at 394-95.

In conclusion, the Commission still finds that the 10-mile EPZ should not be increased to 20 miles.

#### Issue 2. Extend the EPZ from 10 miles to 20 miles because the effect of rainout was not adequately considered when the size of the EPZ's was determined

Another reason given in support of an expansion of the EPZ was that rainout was not adequately considered when the size of the EPZ's was determined. "Rainout" is the deposition of radioactivity on the ground due to rain scouring radioactive materials from the air. For example, the Seacoast Anti-Pollution League said,

Yet another reason to extend the EPZ to at least 20 miles is the danger of rainout of the radionuclides from the plume. The dosage estimates in NUREG-0396 assume a uniform rate of deposition of radioactive material from the plume . . . if half the material remaining in the plume were to be washed out by a rainstorm between a radius of 15 to 20 miles from the reactor, the doses would be as high as they were within the 5- to 10-mile interval.

#### Commission Response

Rainout was considered. The statement that the dosage estimates in NUREG-0396 assume a uniform rate of deposition of radioactive material is in error. A full page (p. I-25) of NUREG-0396 is devoted to a discussion of rainout effects. While NUREG-0396 does not explicitly say so, the calculated doses presented in Figures I-10 through I-15 do, in fact, include the effects of rainout.

Rainout is included in the following manner. The entire release of radioactivity is assumed to be contained in a small highly concentrated puff. The

probability of such a puff occurring is approximately 1 time in 100,000 years. Wind is assumed to blow the puff directly over a large population center during period of extreme atmospheric stability with minimal dilution of the puff so it never becomes much more than a mile in diameter. When the puff is directly over the population center, an extremely heavy rainfall scours most of the nongaseous radioactive material from the cloud and deposits it on the ground. If such a puff is released, the probability of the puff encountering these weather conditions is approximately 1 in 10,000. The radioactivity is assumed to remain on the surface of the ground with no entrance into sewers, no runoffs, and no sinking into the ground to remove or shield the radioactivity. The calculations assume that 100 percent of the radioactivity will remain on the surface without any runoff, but in reality the probability of this is near zero. The people are assumed to be exposed with minimal shielding to the radiation from radiation from the deposited material; in other words, that no one is in an apartment building, no one is in an office building, no one is in a basement, and no one is in any other type of building that provides more shielding than a small one-story frame house. The assumed probability of this is one, whereas it is in reality near zero. The people remain where they are with no evacuation or other protective action for 24 hours. The probability of no emergency response for 24 hours is assumed in the calculations of consequences to be one, but in reality the probability is near zero. It is this specific series of events that gives rise to the largest casualty figures that have been calculated for severe nuclear accidents and which are presented in NUREG-0396. Because of these assumptions, the calculated consequences are greatly overestimated.

#### **Issue 3. Extend the EPZ from 10 miles to 20 miles because ad hoc actions beyond 10 miles would not be adequate**

Another reason given by the Citizens Task Force of Chapel Hill, NC petition and several commenters to expand the EPZ is that they did not believe the NRC's statement in its final rule on emergency planning, 45 FR 55402; (August 19, 1980) and NUREG-0396, page 16, that the 10-mile plume EPZ was "large enough to provide a response base that would support activity outside the planning zone." The Citizens Task Force petition quoted a FEMA report,<sup>6</sup>

"Like the '5-mile' plans at TMI they [emergency plans with a 10-mile EPZ] may reflect inadequate definitions of the threat, encouraging a false sense of readiness, and delay preparations for a more suitable response to a crisis." The Union of Concerned Scientists noted that it would require only one to four hours for the plume to reach 10 miles. Thus, there would not be adequate time to notify people beyond 10 miles to evacuate.

Commenters opposed to the petition said that the detailed planning for the 10-mile EPZ could be applied outside the 10-mile EPZ if necessary. They also noted that the Commission had already made a judgment on this question in its rulemaking on emergency preparedness (45 FR 55402 and 55406). For example, the law firm of Shaw, Pittman, Potts, and Trowbridge argued:

Thus, it is likely given the means usually used to distribute public information materials, that the geographic area actually covered will be greater than the plume exposure pathway EPZ. Similarly, the systems used to notify the public to take protective actions provide coverage substantially beyond the EPZ boundary, since the radio and television stations used in the Emergency Broadcast System ("EBS") can be received at distances in excess of 10 miles. And, with respect to actual protective measures, it is clear that sheltering can be accomplished with equal ease by people both inside and outside the EPZ. As to evacuation, even that measure can easily be built upon and use evacuation plans developed for within the 10-mile EPZ.

#### **Commission Response**

NUREG-0396 noted that

it was the consensus of the [NRC-EPA] Task Force that emergency plans could be based upon a generic distance out to which predetermined actions would provide dose savings for any such accidents. Beyond this generic distance it was concluded that actions could be taken on an ad hoc basis using the same considerations that went into the initial actions determinations. [Thus], the size of the EPZs need not be site specific, [as] emergency planning needs seem to be best served by adopting uniform EPZs for initial planning studies for all light water reactors.

Additionally, the Commission firmly believes that emergency actions could be successfully carried out beyond 10-mile EPZ for the following reasons: First, the 10-mile planning basis establishes an infrastructure consisting of emergency organizations, communication capabilities, training and equipment that are similar to other normal community emergency organizations, such as police and fire departments that can be used in the event of an accident at the facility. Second, the radio and TV emergency

broadcasting systems that NRC requires for prompt notification of the public within the 10-mile EPZ does reach beyond 10 miles. Third, if emergency actions were necessary beyond 10 miles, the time available to take those actions would be significantly greater than the time available for the taking of protective actions for persons close to the reactor (within 2 miles). This significant additional time (many hours to days) would permit the use of resources from other states, other utilities, the Federal government, and even the international community.

Beyond these reasons, the relationship between wind speed and hazard may have been misunderstood. Higher wind speeds result in lower radiation doses because the radioactive plume becomes greatly diluted and dispersed at higher wind speeds. This was discussed in NUREG-0396.

Further, the radioactive plume is not likely to originate without warning. The nuclear power plant operators, in most cases, would be able to declare an emergency hours before a release, based on what they understand to be happening in the plant. The NRC requires utilities to set emergency action levels for in-plant measurements for which emergencies should be declared (see 10 CFR Part 50, Appendix E and NUREG-0654, Appendix I.) Thus, evacuation recommendations should be made before releases of radioactivity would occur, giving people time to evacuate before the radioactivity would arrive. The petitioners may not be aware that the need for evacuation beyond a few miles from the plant is extremely unlikely. If protective actions were needed beyond 10 miles, the action required would most likely be sheltering while the plume passes and then evacuation of relatively small areas afterwards if much deposition of radioactive materials on the ground were to occur.

Another reason not to expand the EPZ is based upon the fact that risk is highly concentrated in the areas near the nuclear power plant, rather than spread uniformly throughout the 10-mile EPZ. However, the Commission notes that despite the technical information to the contrary, the entire EPZ tends to be thought of by many members of the public as a single homogeneous zone to be treated in a uniform manner. Expanding the EPZ radius from 10 miles to 20 miles might even further aggravate this situation.

<sup>6</sup> Evacuation Planning in the TMI Accident, FEMA, January 1980.

**Issue 4. Extend the EPZ from 10 miles to 20 miles because the reduction of early injuries and latent cancers fatalities were not considered when the size of the 10 mile EPZ was determined**

Several commenters said a reason to expand the EPZ is that in establishing the emergency planning zone, not only early fatalities, but also early injuries and future disease such as cancer should be considered. The Union of Concerned Scientists wrote:

It is by no means clear that prompt fatalities are the dominant health effect from serious reactor accidents. In addition to prompt fatalities, the following additional effects must be considered in establishing an appropriate plume EPZ: (a) latent fatalities, (b) early radiation injuries, (c) non-fatal cancers, (d) genetic effects, and, to a lesser extent, (e) property damage and restrictions on land use caused by accidents. Risk assessment studies have shown consistently that effects other than prompt fatalities constitute a significant portion of the total effects of serious reactor accidents. For instance, Dr. Jan Beyea has pointed out that for the accident in WASH-1400 which was postulated to cause 10 prompt fatalities, the following additional consequences would occur: 7000 cancer deaths, 4000 genetic defects, 60,000 thyroid tumor cases, and 3000 square miles of land contaminated above acceptable levels.

#### Commission Response

The Commission agrees with the commenter that for most accidents, long-term effects—cancer and genetic defects in offspring—are the most significant effects, from the standpoint of the gross number of effects. Only the most severe accidents could result in any prompt fatalities or injuries. With the existing levels of emergency preparedness it is likely that no one who followed the recommended protective actions would be killed or injured.

Our emergency planning requirements do not require that an adequate plan achieve a preset minimum radiation dose saving or a minimum evacuation time for the plume exposure pathway emergency planning zone in the event of a serious accident. Rather, they attempt to achieve reasonable and feasible dose reduction under the circumstances; what may be reasonable or feasible for one plant site may not be for another. 24 NRC at 30.

A fair reading of the Commission's Shoreham discussion is that implicit in the concept of "adequate protective measures" is the fact that emergency planning will not eliminate, in every conceivable accident, the possibility of serious harm to the public. Emergency planning can, however, be expected to reduce any public harm in the event of a serious but highly unlikely accident. The proper interpretation of the rule would

call for adjustment to the exact size of the EPZ on the basis of such straightforward administrative considerations as avoiding EPZ boundaries that run through the middle of schools or hospitals, or that arbitrarily carve out small portions of governmental jurisdictions. The goal is merely planning simplicity and avoidance of ambiguity as to the location of the boundaries.

Given these circumstances, the Commission has concluded that adequate protection can be provided by an EPZ that is about 10 miles in radius.

#### Issue 5. Extend the EPZ from 10 miles to 20 miles because the radiation from an accident would not stop at 10 miles

Several commenters who favored the recommended change to expand the EPZ gave as a reason that radiation "is not likely to stop at the 10-mile mark in the case of a serious accident." One said, "No one believes that people are any safer at 11 miles than at 10 miles out." Another said, "There is no 10-mile island with lead walls to the sky to prevent radioactivity from blowing beyond the NRC's emergency planning zone."

#### Commission Response

Obviously, there is no line at 10 miles beyond which radiation cannot pass. However, the hazard from an accident tends to gradually decrease as one moves further from the accident. How far from a nuclear power plant is the potential hazard small enough that specific detailed planning is not worthwhile? In the Commission's judgment, that distance is about 10 miles for the considerations stated in this discussion.

#### Issue 6. Extend the EPZ from 10 miles to 20 miles because at TMI a 20 mile evacuation was considered

The Citizens Task Force petition and commenters gave the 20-mile evacuation consideration during the Three Mile Island accident as a reason to expand the EPZ to 20 miles. The Task Force quoted a FEMA report as follows:

Emergency management agencies entered the crisis with contingency plans to evacuate a 5-mile circle around TMI. . . . Two days into the accident, the same scientific authorities (now faced with a novel and unexpected situation) suddenly recommended a 10-mile, then a 20-mile contingency evacuation plan. Under emergency conditions, local and State officials were forced to scrap a relatively undemanding 5-mile evacuation and plan for a large, complex population movement on short notice. (p. vi, reference 9.)

The Seacoast Anti-Pollution League noted that the Kemeny Commission

Report said, ". . . the NRC itself was considering evacuation distances as far as 20 miles, even though the accident was far less serious than those postulated during siting."<sup>7</sup> The Community Energy Action Network quoted the Rogovin Report's<sup>8</sup> conclusion that a 10-mile EPZ is inadequate:

However, we believe the NRC's proposed 10-mile planning zone, is, by itself, inadequate as an arbitrary cutoff point. Wider evacuation may clearly be necessary in some unlikely accident situations. And, as Three Mile Island demonstrated, an ordered evacuation out of 10 miles would undoubtedly have effects to 20 miles and more. Therefore, at the very least, significant centers of population beyond 10 miles from the plant must be considered in the planning as well. Rogovin Report, Vol. 1, p. 33.

Commenters opposed to the petition said that emergency preparedness had increased greatly since the Three Mile Island accident. For example, Barry G. Wahlig, a nuclear engineer, wrote:

The vacillation over evacuation at TMI is in no way representative of the post-TMI world. At that time, utility and regulatory personnel had scarcely thought about how to think about evacuation. The tenor of emergency exercises over the last three years assures that responsible people have given considerable thought to how to arrive at defensible evacuation recommendations. To the extent reasonably possible, emergency exercise experience shows that plant personnel could make such recommendations in an orderly, timely way.

#### Commission Response

The Commission believes that if protective actions were warranted beyond 10 miles, those actions, whether evacuations, sheltering or relocation, would certainly be recommended to the State officials. Nonetheless, due to the additional time that is available for the taking of protective actions out to greater distances from the reactor, the implementation of these additional protective actions would not require detailed plans.

#### Issue 7. Extend the EPZ from 10 miles to 20 miles because of the lessons learned from the Chernobyl accident

A few commenters suggested that the NRC should modify its regulations because of the evacuation that took place as a result of the Chernobyl accident.

<sup>7</sup> John G. Kemeny, Chairman, Report of the President's Commission on the Accident at Three Mile Island, at 16 generally called the "Kemeny Commission Report," October 1979.

<sup>8</sup> NUREG/CR-1250, Three Mile Island—A Report to the Commissioners and to the Public, generally called "Rogovin Report," January 1980.

### Commission Response

A number of facts<sup>8</sup> about the Chernobyl accident bear on emergency planning and preparedness around U.S. commercial nuclear power plants. The implications of the Chernobyl accident and the Soviet response will now be discussed in relation to three aspects of U.S. emergency planning, namely: (1) Size of the emergency planning zone, (2) ingestion pathway measures, and (3) decontamination and relocation.

In drawing a nexus between the Soviet response to the Chernobyl accident and emergency planning implications for U.S. plants, contrasts and differences should be noted. First, there is a substantial difference in the emergency planning base. After the accident at Three Mile Island, large resources were expended to improve emergency planning and response capabilities around U.S. plants. In contrast, although some prior planning appears to have existed in the Soviet Union, perhaps for civil defense, there is little indication that the Soviets have comparable site-specific emergency plans for the general public around their nuclear power plants. Despite this, the Soviets mounted a large and generally effective ad hoc response.

Second, the specifics of the Chernobyl release are unique to the RBMK design. The amounts of radioactive material released from U.S. plants could be as severe but for many accident sequences would be considerably less because, among other things, U.S. plants have substantial containments. In addition, although low-probability, fast-moving accident sequences may be possible, severe accidents at U.S. plants would, in general, progress more slowly resulting in longer warning times before release.

Third, some aspects of the Chernobyl evacuation defy comparison with similar aspects at U.S. plants because of economic and societal differences. For example, the Soviets had to assemble 4000 buses and trucks for the Chernobyl evacuation, whereas, in the United States most people have access to private transportation and necessary alternative transportation is preplanned around U.S. nuclear power plants.

*Size of the EPZ's:* The Chernobyl accident has focused attention on the adequacy of the size of emergency planning zones around U.S. commercial nuclear power plants. The Soviets evacuated a total of about 135,000 people as well as considerable farm livestock from Pripyat, Chernobyl, and other towns and villages within 30

kilometers (18 miles) of the Chernobyl nuclear power plant. This evacuation appears to have taken place in several stages, beginning for the approximately 45,000 residents of Pripyat about 36 hours after the initial release and extending over several days to a week. The whole-body radiation dose to the majority of individuals did not exceed 25 rem, although about 24,000 persons in the most severely contaminated areas are estimated to have been exposed to whole-body doses in the range of 35-55 rem. The population of Pripyat was initially sheltered as a protective measure and then evacuated when radiation readings increased. In addition to radiation considerations, logistics and contamination control influenced the timing of the evacuation. Despite an apparent lack of site-specific planning, the Soviets mounted a large and generally effective ad hoc response making use of some aspects of civil defense planning. The high initial plume height contributed to relatively low initial dose rates in the immediate vicinity (by cloud seeding other areas) and the spraying of a chemical polymer on evacuation routes to minimize resuspension of deposited activity were also beneficial. The Soviets took ingestion pathway protective measures within the 30-kilometer zone and well beyond. Ingestion pathway protective measures were also taken in several Soviet bloc countries, in Scandinavia, and in Eastern and Western Europe.

*Assessment:* One difficulty in assessing the implications of emergency actions taken at Chernobyl for U.S. commercial nuclear power plants is the vast difference in the emergency planning base between the United States and the Soviet Union. After the accident at Three Mile Island, large resources were expended in the United States to improve site-specific and generic emergency planning capabilities. Utility, State, local, and federal emergency plans were developed, reviewed, and exercised. Alert and notification systems have been designed, installed, and tested within the plume exposure pathway EPZs (10-mile radius) for almost all U.S. plants. The populations within the plume exposure pathway for U.S. plants are annually provided with informational materials that are to be used in the event of an emergency. These materials contain protective actions that will be taken and include telephone numbers for public inquiries.

In contrast, there is little indication that the Soviets have comparable site-specific emergency plans for the general public around their nuclear power

plants. While some prior planning existed, perhaps for civil defense, Soviet authorities indicated that many of the protective actions taken were ad hoc measures. Although a severe accident in the United States could require some ad hoc measures to be taken, a detailed planning base exists to facilitate implementation of the necessary protective actions.

With regard to the issue of EPZ size, the Soviets evacuated the population out to 18 miles, or roughly twice the distance for which an evacuation capability is required to be demonstrated in the United States. Similarly, measures were taken to prevent ingestion of foodstuffs, milk and water at distances considerably greater than the 50-mile ingestion exposure pathway in the United States. This might imply that the U.S. EPZs are too small. However, examination of the background leading to the U.S. requirements leads to a different conclusion.

The sizes of the EPZs were derived from accident considerations, including the severe accidents studied in the Reactor Safety Study (WASH-1400). The more severe and most unlikely accidents studied in WASH-1400 involve releases of radioactivity that are comparable or in some instances larger in magnitude to that which was actually released at Chernobyl. The 10-mile and 50-mile EPZs were chosen as a planning basis to demonstrate a capability and to provide emergency plans with the flexibility of dealing with a broad range of accident releases, rather than being based solely on a single highly unlikely event, such as the worst case. It was recognized that protective actions might need to be taken beyond these planning zone distances for the most severe releases. NUREG-0654 clearly notes:

—The choice of the size of the Emergency Planning Zones represents a judgment on the extent of detailed planning which must be performed to assure an adequate response base. In a particular emergency, protective actions might well be restricted to a small part of the planning zones. On the other hand, for worst possible accidents, protection actions would need to be taken outside the planning zones.

Consequently, a release magnitude similar to the one associated with Chernobyl and the possibility that ad hoc actions beyond the planning zone boundaries might be needed for very unlikely events were considered and have been factored into the development of U.S. requirements, including the sizes of the EPZs.

In conclusion, the Chernobyl accident and the Soviet response do not reveal

<sup>8</sup> NUREG-1251, Vol. I—Implication of the Accident at Chernobyl for Safety Regulation.

any apparent deficiency in U.S. plans and preparedness, including the 10-mile plume exposure pathway EPZ size and the 50-mile ingestion exposure pathway EPZ size. These zones provide an adequate basis to plan and carry out the full range of protective actions for the populations within these zones, as well as beyond them, if the highly improbable need should arise.<sup>10</sup>

**Issue 8.** Extend the EPZ from 10 miles to 20 miles because the most current methodologies were not used in NUREG-0396 and because of new source term research information.

The petition submitted by Mr. Sexton as well as a few comment letters suggested that the EPZ size should be based on the most current research information and because the methodologies used in NUREG-0396 are outdated.

#### Commission Response

Draft NUREG-1150 (February 1987) provides substantial new information concerning our ability to predict severe accident progression and the range of outcomes. Based on this information, it appears that the risks and potential consequences associated with severe reactor accidents are no higher than those predicted in the Reactor Safety Study and may, in fact, be substantially lower. However, there are large uncertainties associated with the ability to predict precisely the release amounts once the core-melt accident is underway and the magnitude of the source term associated with a particular outcome. Draft NUREG-1150 (February 1987) provides insights concerning (1) the way offsite doses would be expected to vary with distance for the plants analyzed and (2) the relative effectiveness of different offsite protection actions<sup>11</sup> at various distances.

A very important question is the nature and magnitude of the radioactive release to the atmosphere. The magnitude of the potential release substantially influences the potential offsite consequences. The source terms and principal assumptions for the analyses in this section are given in Tables M.1 and M.2 of draft NUREG-1150 (February 1987). Release of radioactive material to the environment during most severe accidents (particularly those resulting in early containment failure) is modeled as occurring in two distinct phases

although, for most accidents, these phases would be expected to overlap.<sup>12</sup> The first release would be of short duration, usually occurring before there is significant core-concrete interaction, and would consist of the more volatile radiouclide species (i.e., all the noble gases together with significant fractions of the more volatile species such as Cs, I, and Te). The second major release would occur after the core materials have melted through the reactor pressure vessel and are interacting with the concrete cavity. This second release could usually take place over a period of several hours or longer.

The nature of the expected offsite consequences for the plants analyzed, assuming no early offsite protective action is taken, is shown in draft NUREG-1150 (February 1987), Tables M.3 and M.4<sup>13</sup> for early and late containment failure. As can be seen, there could be a significant probability of exceeding a 50-rem<sup>14</sup> whole body dose within a few miles of three of the plants analyzed, even for late containment failure if no protective action is taken. However, this probability diminishes rapidly with distance from the reactor for both early and late containment failure. Probabilities of exceeding 200-rem whole body dose calculated for the Surry plant were compared those obtained using Reactor Safety Study data.

Although the probabilities calculated for draft NUREG-1150 (February 1987) are substantially lower at large distances (due primarily to the assumption of earlier relocation time), the probabilities within a few miles of the plant are comparable.

We have used information from the plants analyzed to calculate how offsite consequences would be expected to vary with distance from each of the plants if different protective actions were taken. The results of these calculations are summarized in draft NUREG-1150, Table M.5 and M.6.

An examination of Table M.5 and M.6 in draft NUREG-1150 (February 1987) provides several preliminary insights. First, either basement sheltering or evacuation will substantially lower the probability of exceeding a whole body

dose expected to produce early health effects although evacuation is clearly much more effective within the first few miles. However, the effectiveness of evacuation diminishes substantially if it is delayed until after containment failure and release of radioactive material to the environment. Sheltering in large buildings appears to be very effective outside the first few miles. Although large building sheltering is not usually available for the general population in the environs of a site, it may be a prudent and valuable option for special population groups (e.g., hospital patients, prisoners).

New technical information from the plants analyzed in draft NUREG-1150 (February 1987) shows that for these plants the probability of a core damage accident is small (in the neighborhood of 1 to 10,000 to 1 in 100,000 reactor years of operation) and that the risks and potential consequence associated with such accidents are no higher than those predicted in the Reactor Safety Study and may be substantially lower. However, there is still uncertainty associated with these estimates.

Some insights obtained from this analysis are summarized below:

1. Time of containment failure significantly affects the magnitude of the release and resulting consequences. The consequences of an early containment failure at a given distance are significantly higher than those for a late containment failure.

2. While there are calculated dose differences among the plants, these appear to be secondary compared to the differences seen between early and late containment failure.

3. For late containment failure and no offset protective action: (a) persons beyond about 1 to 2 miles have a low probability of receiving a dose in excess of 200 rems, and (b) persons beyond about 5 miles have a low probability of receiving a dose in excess of 50 rems.

While thus far the effectiveness of protective actions has been completely investigated only for the Surry plant and no generic conclusions for other plants can be drawn, some preliminary insights that can be gleaned from draft NUREG-1150 (February 1987) are:

1. With regard to protective actions, the principal dose savings benefits are obtained from evacuation first followed by sheltering within the first few miles of the plant.

2. Within the first few miles, evacuation appears to be more effective than sheltering in achieving dose savings. At distances beyond about 5 miles, these differences are less notable.

3. For late containment failure accidents, any of the protective actions analyzed would result in essentially zero probability of a person being exposed to doses in excess of 200 rems at distances beyond 1 mile and to

<sup>10</sup> Ibid.

<sup>11</sup> This analysis addresses only those emergency actions that would have to be taken in the vicinity of the plant to provide protection from the immediate effects of the plume exposure pathways.

<sup>12</sup> All Zion releases were modeled as single-phase releases, but this will be revised for the final version of NUREG-1150.

<sup>13</sup> Unless otherwise specified in the table, the source terms and principal assumptions for Tables M.3 through M.6 are those listed in Table M.1 and M.2.

<sup>14</sup> 200-rem and 50-rem whole body doses were used to allow comparisons with earlier studies [e.g., NUREG-0396 because they serve as surrogates for the early fatality and injury thresholds, respectively.

doses in excess of 50 rems at distances beyond 2 miles.

In conclusion, the Commission agrees that the size of the 10 mile EPZ was determined using the methodologies available in 1980 and that today there exists more sophisticated techniques and computer models to estimate radiation releases and doses to the public. Nonetheless, the most sophisticated and up to date methodologies were used in the development of NUREG-1150 (February 1987) which, as mentioned above, does not provide evidence that the size of the plume exposure pathway EPZ should now be increased.

**Issue 9:** Extend the EPZ from 10 miles to 20 miles because any radiation can be harmful therefore the public should be able to take protective actions to assure that they receive no radiation in the event of an accident

Citizens Task Force of Chapel Hill, NC, petition and some commenters in support of this change gave the reason that any amount of radiation can be harmful. They stated:

It is agreed that a radiation dose low enough to produce no effect has not been identified. In other words, all levels of radiation may produce some effects on cell . . .

Some experts state, however, that one could sit on the fence of a normally operating nuclear power plant for a year and absorb no more radiation than that released by a chest x-ray. This group stresses the fact that people have lived with varying levels of background radiation with no demonstrable negative results . . .

Others, also well informed, argue that our scientific understanding of the long-range effects of low-level radiation continuously emitted into our environment is inadequate at this time to measure the dangers with any degree of certainty. They are concerned that the various effects we get from radiation, pollution, chemical carcinogens, and so forth may lead to a yet undocumented multiplier effect. They see the precipitous rise of cancer rates during the last couple of decades as strong support for this conclusion. They further argue that some radioactive elements released into the air or dumped into the water—even if not immediately dangerous in small amounts—can in some form enter the food chain. Through a process termed "biological amplification," these radioactive elements may be concentrated through the chain of lesser plants and animals until they reach human beings through the food they eat. By this time the radioactive materials may be heavily concentrated. They cite the well documented rise of radiation levels in milk in the United States after weapons testing in China as evidence of this process. . . . And although the level of harm which may result is not agreed upon, it is certain that our bodies take up radioactive elements and use them in the matrix of the

bones and in tissue; that these elements emit radiation for periods ranging from a few days to half a century; that fetuses and children under ten are much more vulnerable to radiation effects; and that cell damage from whatever cause is a medical concern of great importance.

#### Commission Response

The statements above representing the petitioner's interpretation of various views of the hazards of radiation need clarification. The statement that "a radiation dose low enough to produce no effect has not been identified" demonstrates an overestimation of what scientific experiments can accomplish. Experiments on the effects of toxic substances generally do not allow experimenters to draw a conclusion of no effect. If no effect is observed, the experimenter cannot conclude that there was no effect because there may have been an effect that was too small to be observed. There are a number of experiments on low doses of radiation that show no observable effect. From such experiments one can never conclude that there is no effect. Only an upper limit of the size of the effect can be estimated. That has been done for radiation, and there is general agreement among scientists on the approximate upper limit.

Likewise, the statement that "others, also well informed, argue that our scientific understanding of the long-range effects of low-level radiation continuously emitted into our environment is inadequate at this time to measure the damages with any degree of certainty," misrepresents prevailing scientific viewpoints. Scientists are in general agreement that the effects of doses of a few rems are too small to be measured.

The petitioner's statement that, the precipitous rise in cancer rates during the last couple of decades is support for the possible existence of "a yet undocumented multiplier effect" between environmental pollutants seems to be based on an incorrect premise. According to the American Cancer Society, the death rate from all cancers except lung cancers has dropped slightly for males and dropped sharply for females during the last couple of decades (shown, for example, in Figure 19, page 38 of NUREC/BR-0024<sup>15</sup>). The lung cancer death rates

have climbed sharply for males and females, but this is attributed almost entirely to cigarette smoking.

The petitioner's statements that some radioactive elements ". . . can in some form enter the food chain and may be concentrated through the chain" is a long-known and well-documented fact. The concentration effect was predictable from knowledge of biology and was first observed almost 40 years ago before "weapons testing in China." Since this effect was known long before the start of large-scale nuclear electric generation, the radioactivity in the environment and foods near nuclear power plants is and has always been carefully measured both before and during nuclear power plant operation. Radioactivity in foods and water due to nuclear power plants is and has always been kept at low levels.

The petitioner's statement that "cell damage from whatever cause is a medical concern of great important" is misleading. Scientifically, the importance will depend on how many cells are damaged, the nature of the damage, the type of cell damaged, and the probability of the damage to that cell leading to any further consequences. For example, if a large group of people are exposed to a radiation dose of 1 rem each, the EPA's lower protective action guide, about 5 out of 10,000 people would be expected to get cancer as a result. And, because not all cancer is fatal, about 2 out of 10,000 would be expected to die from this radiation-induced cancer. (About 2,000 out of 10,000 people will eventually die of cancer, but those cancers are mainly unrelated to radiation exposure.) Of the 8,995 out of 10,000 who did not get cancer caused by the 1-rem radiation dose, based on current knowledge, their health would be unaffected by their radiation exposure. On the basis of the epidemiological evidence, they would live as long and be as healthy as if they had not received the radiation dose.

**Issue 10:** Extend the EPZ from 10 miles to 20 miles because of the evacuation shadow phenomenon

Commenters in favor of the recommended changes gave as a reason the belief that if an accident occurred many people outside the 10-mile EPZ would evacuate even though they were not advised to do so. They said, in this "evacuation shadow," masses of people would be fleeing in panic, would congest roads making evacuation of those within the EPZ slower or even impossible. As a way to plan for this effect these commenters suggested extending the EPZ zone radius from 10 to 20 miles.

<sup>15</sup> NUREC/BR-0024, Working Safely in Gamma Radiography, September 1982.

Commenters opposing the petition said this was not a problem, because evaluation of nonradiological incidents which have required mass evacuation has also demonstrated that, even without advance planning, an orderly, safe, and prompt evacuation can be undertaken.

#### Commission Response

In CLI-87-12, the Commission noted that:

... we think it is entirely reasonable and appropriate for the Commission to hold that arguments for "adjusting" a 10-mile EPZ to improve safety, especially arguments that entail complex analysis and lengthy litigation are an impermissible challenge to the rule

Accordingly, we think the better interpretation is that the rule precludes adjustments on safety grounds to the size of an EPZ that is "about 10 miles in radius" and that Contention 22.C [whether the EPZ should be expanded by a few miles to minimize the occurrence and effects of spontaneous evacuation from outside the EPZ] should on this ground be deemed impermissible challenges to the rule. In our view, the proper interpretation of the rule would call for adjustment to the exact size of the EPZ only on the basis of such straightforward administrative considerations as avoiding EPZ boundaries that run through the middle of schools or hospitals, or that arbitrarily carve out small portions of governmental jurisdictions. The goal is merely planning simplicity and avoidance of ambiguity as to the location of the boundaries. With such clarity, plans can be implemented with an understanding as to who is being directed to take particular protective actions. 26 NRC at 395 (brackets not in the original).

As noted above, the Commission determined, based on information available at the time that it promulgated the emergency planning regulations, that a plume exposure pathway emergency planning zone (plume EPZ) of about 10 miles in radius was the proper and appropriate area for detailed planning for protective actions in the event of a radiological emergency. At that time, the Commission specifically recognized that detailed planning in that zone would more readily permit the development and implementation of ad hoc actions beyond the 10 mile plume EPZ should the need arise. See NUREG-0386, "Planning Basis for the Development of State and Local Government Radiological Emergency Response Plans in Support of Light Water Nuclear Power Plants," (December 1978); NUREG-0654, "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants," (November 1980), p. 12; Shoreham, 26 NRC, at 392-93, Southern California Edison Co. (San Onofre

Nuclear Generating Station, Units 2 & 3), LBP 82-39, 15 NRC 1163, 1171-73 (1983). In effect, the Commission accounted for the possibility of spontaneous evacuation outside the plume EPZ when it established the size of that EPZ in the first instance. The petitions provide no justification for expansion of the plume EPZ to further account for the possibility of spontaneous evacuations.

#### Issue 11: Extend the EPZ to include any towns bordering on or partially within the EPZ

The Citizens Task Force of Chapel Hill, NC, petition requested the NRC to amend its regulations to state that any towns bordering on or partially within the EPZ be included within the EPZ in their entirety.

Commenters in favor of this request said that if, for example, some suburbs of a city were included in the emergency planning, but the city were not, then fragmented authority would result.

#### Commission Response

As discussed in the Commission response to Issue 1, NUREG-0396 provides that "judgement . . . will be used in determining the precise size and shape of the EPZs considering local conditions such as . . . local jurisdictional boundaries . . ."

Thus, Commission practice already allows for adjustment of the EPZ to accommodate jurisdictional boundaries where appropriate to enhance the planning basis.

#### Issue 12: That a utility fund and install independent monitoring equipment to be used by local communities around nuclear power plants

The Citizens Task Force of Chapel Hill, NC, petition requested that the communities within the EPZ should be provided, with utility funding to purchase, install, and operate their own radiological monitoring equipment. The petitioner said such independent monitoring will permit detection of radioactive materials such as iodine-131 in a short enough time to be useful in making decisions on emergency actions.

As a reason for requiring independent monitoring, the petitioner claimed there is a lack in both quality and quantity of radiation monitoring equipment around nuclear power plants. Since the petitioner believes the utilities do not have adequate equipment, the petitioner believes local communities should provide it for themselves. The petitioner cited as evidence a March 30, 1979 General Accounting Office report, Areas Around Nuclear Facilities Should be Better Prepared for Radiological Emergencies. The section of the report

quoted by the petitioner referred to "deficiencies in . . . preparedness." The petitioner also cited a June 1980 FEMA report, State Radiological Emergency Planning and Preparedness in Support of Nuclear Power Plants. FEMA wrote:

. . . the preparedness of state and local governments with respect to . . . monitoring instruments . . . is generally inadequate to meet the requirements of the new [post-TMI] evaluation criteria.

Commenters opposing the petition said that adequate monitoring equipment is now available, that the evidence cited by the petitioners is outdated and no longer valid, and that such equipment would be too difficult for local communities to use properly. For example, Barry G. Whaling, nuclear engineer, wrote:

Petitioners show a lack of appreciation for the difficulty of making accurate estimates of airborne and groundplane contamination in the post-accident environment. This is especially difficult using the sort of survey meters which the petitioners seem to want supplied in the tens or hundreds to individuals in the nearby communities. Examples of the problems are: (a) Prevention of instrument contamination during the event; (b) ensuring uniformity of instrument calibration and of measurement protocol; (c) differentiation of plume and groundplane contributions without sampling; and (d) precise reporting of the location where measurements are made. Experience shows that even technically competent people are subject to these errors.

The Citizens Task Force petition also said that there is a need for independent monitoring because there is a credibility gap between what the utility and NRC would say during the course of an accident and what the public would believe. The petitioner quoted a May 12, 1979 statement by Dayne H. Broun, Director of Radiation Protection Section of the North Carolina Department of Human Resources, and an April 29, 1979 statement by North Carolina Governor James B. Hunt, Jr., as evidence of lack of credibility. The petitioner wrote:

The largely spontaneous and unorganized evacuation of several hundred thousand people from the area around the Three Mile Island (TMI) accident reflects a serious problem: the lack of public confidence in the utilities' commitment and ability to provide timely and accurate warnings regarding leakages of radioactivity and/or reactor problems. The resultant uncertainty contributed to very real psychological stress experience by citizens living in communities around the reactor.

The Sorghum Alliance wrote:

Independent radiation monitoring is necessary because of the history of utilities' and the NRC's reluctance to let the public

know of danger and also because of problems in utility-managed monitoring equipment.

The NRC officials played down the gravity of the accident at Three Mile Island, as they were more concerned with the public relations impact of their statements than with technical accuracy.

Commenters opposing the Citizens Task Force petition saw little evidence of a problem with a credibility gap. The law firm of Shaw, Pittman, Potts, and Trowbridge wrote:

Aside from two newspaper accounts of statements made more than three years ago by the North Carolina Governor and the State Director for Radiation Protection, petitioner offers no support for its broad-based claim of a 'credibility gap'.

Barry G. Wahlig, a nuclear engineer wrote:

Whether or not they suffer a 'credibility gap' as alleged by the petitioners, the existing monitoring organizations are answerable to responsible bodies. The diffuse group of independent monitors suggested by petitioners would be answerable to no one but themselves for the accuracy of their measurements, the method of their reporting, or the consequences of poor values. This lack of responsibility would make their measurements less reliable, not more so.

#### Commission Response

The Commission agrees that as of March 30, 1979, there was a need to be better prepared for emergencies around nuclear power plants. This need prompted the Commission to publish in the Federal Register (45 FR 55402; August 19, 1980) an upgraded emergency preparedness regulation. The regulation required, among other things, the establishment of emergency planning zones, the development of emergency action levels, the installation of prompt public warning systems, and adequate offsite monitoring capabilities. Implementation of these upgraded regulations has been completed.

Equipment capability is continually checked by NRC and FEMA. The Commission does not believe there is a lack of monitoring equipment and therefore does not see lack of equipment as a reason to amend its regulations to require that monitoring equipment be given to and operated by local communities.

The Commission also finds no basis to assume there is a credibility gap that would cause a danger to public health and safety. There is no evidence that the majority of the public would not respond to protective actions ordered by responsible government authorities. At Three Mile Island, although people evacuated to a far greater extent than officially recommended and without a written plan, the evacuation was quite orderly.

The Commission also finds no basis for the claim that "NRC officials played down the gravity of the accident at Three Mile Island." In fact, quite the contrary occurred. Admittedly, there were confusing and contradictory statements which alarmed the public. But, if anything, the actual danger may have been exaggerated rather than downplayed.

Furthermore, the proliferation of independent radiation monitoring could result in conflicting and confusing information during the course of an accident. Confusion can be minimized if information from all sources flows to a single operations center where it can be analyzed by experts. Expert opinion could then be presented to the state and local governments charged with the responsibility to order protective actions.

Moreover, even if the reason advanced by the petitioner and commenters were valid, independent monitoring would not be a solution. Offsite monitoring is not intended and cannot be used properly by itself to make initial decisions on protective actions. Elevated radiation levels offsite are among the very last indicators of a serious accident and tend to occur at a time when protective action decisions should already have been made. The earliest indication of a serious accident would be seen in the nuclear power plant control room. Numerous indicators and alarms would tell the operators that there is a problem and should enable them to assess the problem. By NRC regulation, each plant has a set of emergency action levels based on specific plant conditions which can be used to project potential offsite doses. Projected dose information allows protective actions to be taken or at least considered prior to the arrival of the radioactive plume. For example, if a core-melt were to occur causing a large release of radioactivity, there would necessarily be some time between the start of the accident and the release of the radioactivity from the fuel to the containment because it takes time for the heat being generated to evaporate the available water and heat the fuel to its melting point. During this time, projected doses can be calculated and protective actions can be decided upon, recommended to the state and local governments, and ordered before any appreciable amount of radioactivity has been released to the environment.

During the Three Mile Island accident, the radioactivity actually released came from auxiliary plant systems. The amount of radioactivity in these systems was relatively small and no protective actions would have been indicated

based on those releases because the radiation dose, actual or projected, was small. The main threat perceived by the NRC staff was the potential threat from a hydrogen gas explosion in the reactor that could conceivably result in added core damage and in-turn present added threat to the containment integrity.

While the fears over an explosion of the hydrogen gas were not technically well-founded and, of course, the situation did not materialize, it was the central basis for the evacuation recommendation that was made. The recommendation was not based on elevated radiation readings offsite because none of the offsite readings were high enough to justify ordering evacuation as a protective action.

#### Issue 13: Current planning is inadequate

The Citizens Task Force of Chapel Hill, NC, petition as a reason for the recommended rule change, stated that "Emergency planning and preparedness in support of nuclear power plants is presently inadequate and incapable of providing an acceptable level of radiological emergency preparedness." Since utilities are seen as not providing adequate emergency preparedness, communities are seen as having to provide it for themselves. The petitioner believes that this situation requires them to have their own monitoring equipment to detect radioactive materials in a short enough time to allow them to make their own decisions on emergency actions.

The Citizens Task Force petition quoted a FEMA report which said that, for some of the 12 nuclear power plant sites with the highest population density within the 10-mile EPZ, "the current alert and notification systems are judged to be totally inadequate . . ." (FEMA, Dynamic Evacuation Analyses, p. 5, February, 1981).

A number of commenters expressed little confidence in current emergency plans saying they should be more site-specific, taking into account the population density, large population centers just outside the 10-mile EPZ, a lack of sufficient roads or the presence of bottlenecks on the roads, geography, and meteorology of each specific site.

Commenters opposing the petition said that present emergency preparedness is adequate, that the petitioner based its conclusions on outdated information, and that the upgrade in emergency preparedness by utilities since the Three Mile Island accident should be recognized and given credit. For example, KMC, Inc. wrote:

Beginning in early 1981, each operating nuclear facility's emergency plan was appraised by the NRC using NUREG-0654 as

the basis of the appraisal and each facility exercised its plan in conjunction with the State and local governments with both NRC and FEMA as judges as to the adequacy of the exercise. Utilities were given 120 days to correct deficiencies which could have an adverse impact on the ability of the utility to promptly and effectively respond to an emergency. Further, nuclear facilities are required to annually have an independent audit of their program and to have an exercise in conjunction with State and local jurisdictions. In addition, the NRC will perform an annual appraisal of each utility's emergency plan to assure that the utility's emergency capability does not degrade. It is inappropriate to compare performance of emergency planning capability and implementation in 1979 with what has been required and demonstrated in 1981 and 1982 by the utilities.

#### Commission Response

The Commission does not agree with the petitioner's claim that emergency preparedness is presently inadequate. Emergency preparedness has been considerably increased since the Three Mile Island accident. The FEMA report cited was written to evaluate the alerting system existing at that time against draft criteria that had just been issued for comment and interim use. Since the FEMA report was written, final criteria have been published and systems have since been improved to meet the criteria. FEMA and NRC now periodically evaluate the emergency preparedness at nuclear power plants and have generally found the preparedness adequate. Where improvements were thought necessary, they have been ordered.

The Commission does agree that site-specific factors, such as those mentioned by some commenters, should be taken into account in emergency plans. In fact, NRC regulations (10 CFR 50.47(c)(2)) already require emergency plans to consider site-specific factors.

#### Issue 14: Utility funding of emergency preparedness

Another change recommended by the Citizens Task Force of Chapel Hill, NC petition is that utilities be required to finance the emergency planning and preparedness efforts of the municipalities around nuclear power plants. The Citizens Task Force wrote:

Lack of funding is the single largest impediment to the establishment of an adequate level of emergency preparedness around nuclear reactors. . . .

Many states clearly have been unable to achieve effective legal steps to insure that utilities finance adequate emergency preparedness around nuclear plants.

The role of the federal government in regard to emergency preparations should be to insure that the communities in those states which have not, or will not soon, enact

preparedness-financing legislation do receive adequate funding.

Commenters in support of the recommended change to require utility funding said that utilities should pay the full cost of choosing to build a nuclear plant instead of some other type of generating plant. They said this should be considered part of the cost of doing business and that in some cases funding of emergency preparedness is a real hardship for the municipalities or counties involved. They said it is unfair to expect local governments to finance these plans since some of the areas under obligation to plan for nuclear power plant accidents do not receive any tax revenues from the plant. One commenter said:

. . . considering the unique and deadly dangers of radiation, it is insane to reduce the already inadequate methods of protection and regulations. The utilities and the government owe it to us to pay for our safety. They are putting our lives in jeopardy, not the other way around.

Commenters opposing the petition generally stated that there was no need for such a funding requirement. They said that FEMA has not found state and local plans inadequate due to lack of funding and that voluntary utility assistance together with state and local programs to assess costs for radiological emergency preparedness have been successful. All seven of the state and local emergency preparedness agencies that commented on the petition say there is no need for such a funding requirement. Commenters said that states should have jurisdiction over this area of utility funding and that the Federal Government does not have the expertise or the legal right to mandate utility rate structure changes.

Some commenters thought utilities should not be forced to fund all local emergency preparedness efforts because many of the emergency preparedness improvements also improve governmental abilities to cope with natural disasters and other types of man-made emergencies. The utilities should not have to bear the full costs of these improvements in plans and facilities which overlap with other functions normally required of the governments.

Some commenters said utilities had a strong incentive to fund local preparedness efforts. The State of Iowa Office of Disaster Services said that Iowa already receives funding assistance from four nuclear facilities and added:

Obviously the utilities do not, by law, have to provide this funding, but practically speaking, it is being done. The onus of FEMA

critique and NRC censure with operating license ramifications serves as a pragmatic inducement for all utilities to provide the radiological emergency response planning and exercise funding. To include this in a petition for rulemaking and potential legalization may do no more than to create an intensely acrimonious relationship between state government and utilities. Why legalize what I know to already be the case in Iowa and other surrounding states, on a cooperative basis.

Several law firms said NRC did not have authority to require such funding. The law firm of Shaw, Pittman, Potts, and Trowbridge wrote:

The simple answer to this request is that Commission lacks the legal authority to impose such a tax. . . . This is because the provision pursuant to which the Commission collects fees from Utilities, 31 U.S.C. 483 a (1976), has been authoritatively construed by the United States Supreme Court to authorize the imposition of fees only to cover services rendered by a federal agency and then only if those services confer a special benefit on the fee-paying entity and not general benefit on the public at-large. . . . This clearly would exclude the tax suggested by petitioner which would cover costs not incurred by the Commission and would result in general public benefits rather than specifically identified benefits of the utilities.

Some commenters pointed out that utilities already pay considerable taxes and deserve some services in return. They said, typically, that nuclear power plants tend to be the largest single tax paying organization in their political subdivision and, as a result, the residents of an area generally benefit from higher than average tax revenues, even though the tax burden on the individual is usually lower than average. Thus, municipalities around nuclear power plants already derive sufficient funds from the operation of the plant to finance their emergency planning efforts.

#### Commission Response

Funding arrangements are essentially a matter of state and local government interest; therefore, the Commission finds no factual basis to conclude that the proposed funding is necessary to enable state or local governments to establish adequate emergency preparedness plans. Accordingly, we do not reach the question of our legal authority to require licensee funding in the manner requested by the petitioner.

#### Issue 15: That emergency preparedness requirements be established for low power operations

The State of Maine petition requested that the NRC require that offsite emergency preparedness findings be

made before any fuel loading and/or low power operations are permitted.

#### Commission Response

In a final rule published in the Federal Register on September 23, 1988 (53 FR 36955, 36960) the Commission addressed this specific matter and for the reasons stated therein revised 10 CFR 50.47(d) to read . . .

\* \* \* no NRC or FEMA review, findings, or determinations concerning the state of offsite emergency preparedness or the adequacy of and capability to implement State and local or utility offsite emergency plans are required prior to issuance of an operating license authorizing only fuel loading or low power testing and training (up to 5 percent of the rated power). Insofar as emergency planning and preparedness requirements are concerned, a license authorizing fuel loading and/or low power testing and training may be issued after a finding is made by the NRC that the state of onsite emergency preparedness provides reasonable assurance that adequate protective measures can and will be taken in event of a radiological emergency. The NRC will base this finding on its assessment of the applicant's onsite emergency plans against the pertinent standards in paragraph (b) of this section and Appendix E. Review of applicant's emergency plans will include the following standards with offsite aspects.

(1) Arrangements for requesting and effectively using offsite assistance on site have been made, arrangements to accommodate State and local staff at the licensee's near-site Emergency Operations Facility have been made, and other organizations capable of augmenting the planned onsite response have been identified.

(2) Procedures have been established for licensee communications with State and local response organizations, including initial notification of the declaration of emergency and periodic provision of plant and response status reports.

(3) Provisions exist for prompt communications among principal response organizations to offsite emergency personnel who would be responding onsite.

(4) Adequate emergency facilities and equipment to support the emergency response onsite are provided and maintained.

(5) Adequate methods, systems, and equipment for assessing and monitoring actual or potential offsite consequences of a radiological emergency condition are in use onsite.

(6) Arrangements are made for medical services for contaminated and injured onsite individuals.

(7) Radiological emergency response training has been made available to those offsite who may be called to assist in an emergency onsite.

#### Issue 16: Emergency plans should be completed and approved by the Governor of the affected State as a precondition to construction

The State of Maine petition requested that the Commission amend 10 CFR

§ 50.47 to require that emergency planning be done before any construction of a nuclear facility is permitted and that the Governor or Governors of any affected State approve the emergency plans as a precondition to construction.

#### Commission Response

The intent of the State of Maine's petition was granted in part in a final rule published in the Federal Register on April 18, 1989 (54 FR 15372, 15393) where the Commission added new regulations to provide for issuance of early site permits, standard design certifications, and combined construction permits and operating licenses for nuclear power reactors. The aim of this rulemaking was to provide procedures for the standardization of nuclear power plants and the early resolution of safety and environmental issues in licensing proceedings. The new rule requires in 10 CFR part 52, § 52.79(d) that applications for a combined construction permit and operating license must contain emergency plans which provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency at the site.

(1) If the application references an early site permit, the application may incorporate by reference emergency plans, or major features of emergency plans, approved in connection with the issuance of the permit.

(2) If the application does not reference an early site permit, or if no emergency plans were approved in connection with the issuance of the permit, the applicant shall make good faith efforts to obtain certifications from the local and State governmental agencies with emergency planning responsibilities (i) that the proposed emergency plans are practicable, (ii) that these agencies are committed to participating in any further development of the plans, including any required field demonstrations, and (iii) that these agencies are committed to executing their responsibilities under the plans in the event of an emergency. The application must contain any certifications that have been obtained. If these certifications cannot be obtained, the application must contain information, including a utility plan, sufficient to show that the proposed plans nonetheless provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency at the site.

These provisions provide that to the maximum feasible extent emergency plans will be approved by the NRC before it issues the construction permit for a new nuclear power plant.

#### The petition(s) are denied

In conclusion, the Commission finds that an insufficient basis exists for

amending its regulations on emergency preparedness in any of the ways recommended by the petitioners. The petitions of the Citizens' Task Force of Chapel Hill, North Carolina; Mr. K. Sexton; and the Attorney General of the State of Maine are hereby denied.

Dated at Rockville, Maryland this 13th day of February, 1989.

For the Nuclear Regulatory Commission,  
John C. Hoyle,  
*Assistant Secretary to the Commission.*  
[FR Doc. 90-3735 Filed 2-15-90; 8:45 am]  
BILLING CODE 7590-01-M

## NATIONAL CREDIT UNION ADMINISTRATION

### 12 CFR Parts 722 and 741

#### Appraisals and Requirements for Insurance

**AGENCY:** National Credit Union Administration (NCUA).

**ACTION:** Proposed Amendments.

**SUMMARY:** This proposed regulation implements Title XI of the Federal Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"). It is intended to protect Federal financial and public policy interests in real estate-related financial transactions requiring the services of an appraiser. Title XI of FIRREA and this proposed regulation provide the affected Federal entities with added assurance that real estate appraisals used in connection with Federal responsibilities and requirements are performed in accordance with uniform standards by individuals whose competency has been demonstrated and whose professional conduct will be subject to effective supervision. Toward this end, the proposed regulation identifies which transactions require an appraiser, sets forth minimum standards for performing appraisals, and distinguishes those appraisals requiring the services of a state-certified appraiser from those requiring a state licensed appraiser. Uniform proposed regulations are being issued by all Federal financial regulators.

**DATES:** Comments must be received on or before April 17, 1990.

**ADDRESSES:** Send comments to Becky Baker, Secretary, NCUA Board, 1776 G Street NW., Washington, DC 20456.

#### FOR FURTHER INFORMATION CONTACT:

Michael J. McKenna, Office of General Counsel, at the above address or telephone: (202) 682-9630, or Timothy P. Hornbrook, Office of Examination and

Insurance, at the above address or telephone: (202) 682-9640.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

Title XI of FIRREA is designed to insure more reliable appraisals rendered in connection with federally-related transactions. Section 1121 of FIRREA defines a "federally related transaction" as a real estate-related financial transaction which, *inter alia*, requires the services of an appraiser. Pursuant to the provisions of Title XI, the NCUA Board (in conjunction with the other Federal financial institutions regulatory agencies and the Resolution Trust Corporation) is proposing to require state-certified or licensed appraisers to be used for all real estate-related financial transactions except those transactions in which a lien is placed on real property solely through an abundance of caution, or the transaction value is less than or equal to \$15,000. The NCUA Board, acting pursuant to section 1112 of FIRREA, is proposing to require state-certified appraisers to be used for all appraisals except noncomplex 1-to-4 family residential property appraisals rendered in connection with a federally related transaction having a transaction value below a specified amount as discussed further herein.

In addition, the NCUA Board is proposing to prescribe standards, pursuant to section 1110 of FIRREA, for the performance of appraisals in connection with federally-related transactions. These standards would require that all such appraisals be written and that they conform to the Uniform Standards of Professional Appraisal Practices ("USPAP") promulgated by the Appraisal Foundation (established November 30, 1987, as a not-for-profit corporation under the laws of Illinois) and the additional standards set forth in this proposed regulation.

This proposed regulation is intended to supplement the appraisal guidelines previously issued in Letter to Credit Unions Number 112 (October 20, 1989). These guidelines will remain in effect, subject to amendment.

FIRREA charges each state with the responsibility to develop certification criteria for real estate appraisers; moreover, each state may elect to develop licensing criteria. The Appraisal Subcommittee of the Federal Financial Institutions Examination Council ("FFIEC"), the Federal financial regulatory agencies, and the Resolution Trust Corporation shall review the qualification criteria established by the

states as these criteria are promulgated and, as authorized by Title XI, may establish additional criteria as may be necessary or appropriate to carry out their statutory responsibilities.

The NCUA Board proposes this regulation to improve the safety and soundness of all federally-insured credit unions. The soundness of real estate loans and investments made by federally-insured credit unions depends upon the adequacy of the underwriting and analysis used to support these transactions. A real estate appraisal is one of several essential components of the lending process. Accordingly, through the integration of existing guidance on real estate appraisals, with the additional requirements imposed by Title XI, this proposed regulation provides the affected entities with a reasonable degree of assurance that real estate appraisals used in connection with federally-related transactions will be reliable.

Public comment is solicited on all aspects of the proposed rule.

##### B. Section-by-Section Analysis

###### *Section 722.1—Authority, Purpose, and Scope*

This section identifies Title XI of FIRREA as the authority under which this regulation is promulgated. Further, it lists those institutions which must comply with the regulation. The regulation applies to all federally-insured credit unions and to the NCUA.

###### *Section 722.2—Definitions*

Except where noted below, the definitions set forth in title XI of FIRREA shall apply to the terms used in this regulation.

**Appraisal.** This definition currently is used by nineteen Federal agencies. NCUA believes that this widespread use and acceptance will produce consistent appraisals.

**Complex 1-to-4 family residential property appraisal.** Section 1113 of FIRREA allows the use of a state-licensed appraiser for, among other federally-related transactions, 1-to-4 family residential property appraisals, "unless the size and complexity requires a State certified appraiser." The definition of "complex 1-to-4 family residential property appraisal" provides guidance on factors that will determine if the services of a state-certified or licensed appraiser are required. This list is illustrative only.

**Market value.** This definition is commonly used in connection with mortgage lending by a number of government agencies and others. This definition contemplates the

consummation of a sale as of a specified date and the passing of title from seller to buyer under open and competitive market conditions requisite to a fair sale. It is designed to provide an accurate and reliable measure of the economic potential of property involved in federally-related transactions. Moreover, the NCUA Board believes that the widespread acceptance and use of this definition will provide consistency to appraisals.

In applying this definition of market value, adjustments to the comparables must be made for special or creative financing or sales concessions. No adjustments are necessary for those costs that are normally paid by sellers as a result of tradition or law in a market area; these costs are readily identifiable since the seller pays these costs in virtually all sales transactions. Special or creative financing adjustments can be made to the comparable property by comparisons to financing terms offered by a third party financial institution that is not already involved in the property or transaction. Any adjustment should not be calculated on a mechanical dollar-for-dollar cost of the financing or concession, but the dollar amount of any adjustment should approximate the market's reaction to the financing or concessions based on the appraiser's judgment.

**Real estate-related financial transaction.** This definition is taken from section 1121(5) of FIRREA, except that "and" is replaced with "or" throughout so as to clarify the intent of Congress that the safeguards of title XI apply as broadly as possible.

**State-certified appraiser.** This classification applies to appraisers who are recognized by the states as being more knowledgeable of and experienced in appraisals than are licensed appraisers. Section 1116 of FIRREA contemplates that each state or territory will adopt standards and procedures, consistent with the purposes of title XI, for obtaining the designation of "state-certified appraiser." To comply with the intent of title XI, each state's standards and procedures must require its certified appraisers to meet, at a minimum, the criteria for certification issued by the Appraisal Foundation. Moreover, no state or territory may certify an appraiser unless that individual passes an examination, administered by the state or territory, that is consistent with and equivalent to the Uniform State Certification Examination issued or endorsed by the Appraisal Foundation. The proposed rule does not prevent a

state from establishing additional certification criteria.

The NCUA under title XI may, in the future, establish certification criteria in addition to those adopted by a given state. Additionally, the Appraisal Subcommittee of the Federal Financial Institutions Examination Council may issue a written finding that the certification criteria of a state or territory are inadequate for specified reasons. Thus, an individual may be a "state-certified appraiser" only if (a) the individual complies with all state-imposed criteria and additional criteria, if any, imposed by the agency hereunder, and (b) the appraiser certifications and licenses of a state have not been rejected by the Appraisal Subcommittee. As of July 1, 1991, appraisals for federally-related transactions must be performed by state-certified or -licensed appraisers, unless this deadline is extended by the Appraisal Subcommittee for a given state.

**State-licensed appraiser.** Each state may elect to adopt licensing criteria that are less rigorous than certification criteria. However, licensing criteria must be adequate to protect Federal financial and public policy interests. For example, simply "grandfathering" all existing appraisers may not be acceptable. Rather, the states and territories are to design criteria that will insure that licensed appraisers will have the experience and training sufficient to perform 1-to-4 family residential property appraisals that are within the dollar thresholds set forth in this proposed regulation and that are not "complex 1-to-4 family residential property appraisals" as this term is defined.

As with state-certified appraiser criteria, NCUA may impose additional licensing requirements. Moreover, the Appraisal Subcommittee is charged with monitoring state appraiser certifying and licensing agencies, and may reject state certifications and licenses if a state's appraisal policies, practices, or procedures are found to be inconsistent with title XI or this proposed regulation.

**Transaction value.** This definition is intended to clarify certain circumstances under which appraisals must be performed by a state-certified appraiser. For example, a state-certified appraiser is required when, among other instances, a 1-to-4 family residential property appraisal is performed in connection with a federally-related transaction having a transaction value greater than \$1,000,000 or 10 percent of a federally-insured credit union's regular reserves and undivided earnings, whichever is less.

#### *Section 722.3—Transactions Requiring State-Certified or -Licensed Appraiser*

(a) **Appraisal not required.** Section 1121(4) of FIRREA defines a federally-related transaction as a real estate-related financial transaction that, among other things, requires the services of an appraiser. NCUA recognizes that not all real estate-related financial transactions will require an appraiser. For instance, an appraisal would not be needed where a lien on real property has been taken as collateral solely through an abundance of caution and where the terms, as a consequence, have not been made more favorable than they would have been in the absence of the lien. In addition, the NCUA proposes not to require a state-certified or -licensed appraiser for real estate-related financial transactions having a transaction value less than or equal to \$15,000. However, this section does not prevent, nor is it intended to discourage, any federally-insured credit union from obtaining an appraisal of property even though not otherwise required by law to do so.

(b) **Transactions requiring state-certified Appraiser.** The legislative history evidences a clear intent that state-certified appraisers be used for most appraisals performed in connection with federally-related transactions. The proposed regulation accomplishes this goal by requiring state-certified appraisers for all federally-related transactions that do not involve 1-to-4 family residential property. Moreover, a state-certified appraiser is to be used for appraisals of 1-to-4 family residential properties in three circumstances: first, for federally-related transactions entered into by NCUA if the transaction value exceeds \$1,000,000; second, for federally-related transactions entered into by federally-insured credit unions if the transaction value exceeds \$1,000,000 or 10 percent of regular reserves and undivided earnings, whichever is less; and third, for federally-related transactions that involve a "complex 1-to-4 family residential property appraisal" as this term is defined.

The NCUA Board recognizes that because of the unique nature of credit unions a stricter standard for the use of certified appraisers may be necessary. Million dollar mortgage loans are not ordinary transactions for credit unions. The NCUA Board requests comments on requiring a certified appraiser on any "non-complex 1-to-4 family residential property appraisal" if the transaction value is in excess of \$200,000.

(c) **Transactions requiring either a state-certified or -licensed appraiser.** Any federally related transaction that

does not require the services of a state-certified appraiser must be performed by at least a state-licensed appraiser. State-licensed appraisers may perform appraisals rendered in connection with federally-related transactions involving only 1-to-4 family residential properties, and only if the transaction value is below the threshold set forth above and the transaction does not involve a "complex 1-to-4 family residential property appraisal."

#### *Section 722.4—Appraisal Standards*

(a) **Minimum standards.** Section 1110 of FIRREA instructs NCUA to prescribe appropriate standards for the performance of appraisals made in connection with federally-related transactions. Further, section 1110 mandates that the standards require, at a minimum, that appraisals be written and that they conform to the generally accepted appraisal standards promulgated by the Appraisal Foundation. NCUA is empowered to require compliance with additional appraisal standards if it makes a written determination that such additional standards are required in order to properly carry out its statutory responsibilities. Section 722.4 of the proposed regulation incorporates the minimum standards set forth in the statute, while listing additional criteria that shall apply to all appraisals performed in connection with federally-related transactions.

In enacting title XI of FIRREA, Congress was responding to perceived problems in the appraisal industry. These problems were identified by the House Committee on Government Operations. They have been cited repeatedly in the legislative history of title XI. NCUA is proposing to adopt the following standards to further the legislative intent in addressing these problems. These standards are designed to contribute to safety and soundness by requiring reliable appraisal reports.

(1) **Compliance with USPAP; departure provision.** This standard incorporates the current standards in the USPAP, and clarifies that the Departure Provision (which allows deviations from the standards) in the USPAP is inapplicable to appraisals conducted in connection with federally-related transactions. The NCUA Board believes that the Departure Provision allows appraisal services to be performed which produce something different from the "appraisal" contemplated by title XI of FIRREA. For instance, a letter opinion might be produced, consistent with current USPAP requirements, that could be

silent about trends of rents, vacancies, or overbuilding. The Comment on the Departure Provision in the USPAP lists examples of when the departure provision might apply; however, for purposes of the proposed regulation, such services are not appraisals as this term is used in title XI. The NCUA Board believes that the Departure Provision in the USPAP allows for the omission of data that should be included in all appraisals rendered in connection with federally-related transactions and, therefore, has proposed that the Departure Provision shall not apply to such appraisals.

Changes in the USPAP after the effective date of this regulation will apply to federally-related transactions unless the NCUA has stated in writing that the change shall not apply to federally-related transactions within its primary jurisdiction.

(2) *Market value.* This standard requires an appraisal to document an appraiser's opinion of a property's "market value" as this term is defined. The definition of "market value" was developed by Fannie Mae and Freddie Mac with the input of many professional appraisal organizations. Without such a standard, a lender might select a definition of value that allows the value of real property to be increased by favorable financing, going concern value, or special value to a specific user. This standard proposes to provide to interested parties the information necessary to determine the value of a property.

(3) *Written appraisals; forms.* This standard sets forth the legislative mandate that all appraisals be written. Moreover, it requires an appraisal to be sufficiently descriptive to enable a reviewer to readily ascertain the estimated value reported and the rationale for that estimate. The appraisal may be in a narrative format or on a form chosen by an appraiser, but the appraisal must comply with all other provisions of the regulation. A form not initially designed for use in connection with federally-related transactions may be used provided that it is modified as necessary to comply with the requirements of Title XI and this proposed regulation. Regardless of the format selected, the appraisal must be readily understood by a third party and must reflect the complexity of the property that is appraised. This will enable the reader of the appraisal to independently determine its adequacy based upon the characteristics of the collateral appraised.

(4) *Sales history.* This standard is designed to enable a reviewer to compare an appraiser's opinion of a

property's market value with recent sales prices. In addition to giving the reviewer a basis by which to evaluate the accuracy of the subject property appraisal, it also will assist the reviewer in identifying recent trends in market prices. A sales history may identify a single sale or a series of sales at artificially inflated prices.

Sales histories are required for one year for 1-to-4 family residential property and for three years for all other types of property. A more demanding reporting standard for nonresidential property is imposed because larger loan amounts are generally granted when the loan security is not a 1-to-4 family dwelling.

(5) *Rents and vacancies.* An appraisal should disclose current income produced by a property if the property will continue to be used to generate income after a transaction is consummated. This information is essential for an accurate picture of the market value of a property. Appraisal values should be predicated upon current rents and current vacancies for the subject property if it is income-producing. That is, appraisals should be based upon income that can realistically be earned under current market and economic conditions (in light of rents being earned on comparable properties), rather than upon estimated or projected income that cannot be supported by current market conditions. If an appraiser reports a high current vacancy, this condition may require a lender to impose special conditions on the loan.

(6) *Marketing period.* This standard requires an appraiser to employ a marketing period that is reasonable in light of a given property's characteristics and market conditions and to disclose the assumptions used. An appraiser's opinion of market value will depend in part on the appraiser's estimate of how long a given piece of property will remain for sale. For instance, an appraisal using a long marketing period is likely to produce a higher market value than would an appraisal using a shorter marketing period. This information will better enable the reader of the appraisal to assess its accuracy.

(7) *Trend analysis.* An appraisal should inform the reader of any market trends, regardless of whether the trend reflects rising or declining values. Such trends might include, for example, increasing vacancy rates, greater use of rent concessions, or declining sales prices. Identification of negative trends is particularly important so that federally-insured credit unions may avoid extending credit on the basis of insufficient collateral. Market trends

may be indicated in market activity on the subject property, such as listing, options, sales agreements; accordingly, such activity should be disclosed.

(8) *Deductions and discounts.* This standard is designed to avoid having appraisals prepared using unrealistic assumptions. For federally-related transactions, the subject property must always be valued in its "as is" condition as of the date of valuation. Further, appropriate deductions or discounts are to be made from an estimated retail or stabilized value to arrive at the market value as of the date of valuation identified in the appraisal. Unsold units or unleased space poses a significant risk to an owner, buyer, or lender. For this reason, the impact of such risks must be reflected in the market value estimate.

(9) *Prohibited influences.* All appraisals are to be performed without pressure from someone who desires a specific value. Accordingly, every appraisal rendered in connection with a federally-related transaction shall include a statement to the effect that employment of the appraiser was not conditioned upon the appraisal producing a specific value or a value within a given range. Similarly, future employment prospects should not be dependent upon an appraisal producing a specified value. Employment and compensation should not be based on whether a loan application is approved, as this, too, would exert pressure on an appraiser to render whatever appraisal is necessary for the loan to be approved.

(10) *Self-contained appraisals.* This standard requires an appraisal to contain all information necessary to enable a reader of an appraisal to understand the appraiser's opinion. The appraisal should not incorporate by reference a document that is not readily available to the reader. Studies prepared by a third party should be verified to the extent his or her assumptions or conclusions are used. Moreover, the appraiser's acceptance or rejection of a third-party study and its impact on value should be fully explained. The appraisal itself should enable the reader to understand the conclusion without having to refer to numerous other documents. Moreover, the conclusion must be reasonable in light of the information set forth in the appraisal. These requirements will force an appraiser to obtain adequate data before issuing an opinion of value.

(11) *Legal description.* A legal description of the property is to be included in an appraisal so as to avoid confusion that may arise from less precise identification. This requirement

will enable a reader to compare the legal description in the appraisal to the legal description in the loan documents. The legal description is to be provided in addition to, and not in lieu of, the description required in the USPAP.

(12) *Personal property, fixtures, and intangible items.* An appraisal is to include a separate assessment of personal property, fixtures, or intangible items that are attached to or located on real property if the personal property, fixture, or intangible items affect the market value of the real property. Furniture and fixtures should have separate valuations because their economic life is shorter than real property improvements and may require special lending or investment considerations. If the personal property, fixture, or intangible item is not a part of the transaction, then this fact should be stated and the impact on market value should be disclosed. Favorable loan financing or any business interest or other intangible item should be valued separately within the appraisal. These requirements will help provide a reader with a more complete understanding of the market value of the real property as it will be at the time of the transaction.

(13) *Use of recognized appraisal approaches.* At the request of clients, some appraisers have not prepared cost estimates of value, or estimates of value based on the capitalization of income, or value estimates based on direct sales comparisons. This standard requires an appraiser to employ each of these recognized approaches to market value and explain how each approach was used. However, if one or more approaches is not used, an appraiser is to explain the elimination of any approach. This requirement is intended to produce appraisals made only after all approaches to market value have been considered and reconciled, thereby improving the accuracy of the appraisal. Disclosure of the fact that an approach was not used will assist the reader in evaluating the adequacy of the appraisal.

(b) *Unavailability of information.* The NCUA Board realizes that some information required by the USPAP or this regulation may be unavailable. For example, historic rent data will not exist for a building under construction at the time of appraisal. However, a reader of an appraisal should be made aware of any material information that is unavailable and why the information could not be obtained, so as to assist the reader in reviewing the appraisal.

(c) *Additional standards.* The standards required by this regulation are the minimum standards to be met by every appraisal made in connection with

a federally-related transaction. However, the NCUA and federally-insured credit unions may employ additional standards if circumstances so warrant.

#### *Section 722.5—Appraiser Independence*

An appraiser's goal should be to produce an objective opinion about the market value of a property. This objectivity may be compromised if the appraiser is involved in the transaction, such as deciding whether to extend credit. An opinion about the merits of the transaction potentially will affect the results of the appraisal. Similarly, a direct or indirect interest in the property appraised may undermine the accuracy of the appraisal. A direct interest would arise, for example, by owning all or part of the property being appraised. An indirect interest would arise if, for example, an appraiser owns property adjacent to the parcel being appraised. This indirect interest would extend to any property whose value is likely to be affected by an appraisal, if the appraisal is the proximate cause for the effect. Moreover, the interest may be nonpecuniary, such as a desire to help an associate obtain a loan.

To further the goal of appraisal independence, the NCUA proposes to require that fee appraisers (that is, appraisers not permanently employed by a FICU) be hired by federally-insured credit unions or their agents rather than by the borrower. In order to avoid potential conflicts of interest, staff appraisers (appraisers that are permanently employed by a federally-insured credit union) should not be supervised, controlled, or influenced by loan underwriters, loan officers, or collection officers.

The NCUA Board recognizes that in certain cases it may be necessary for loan officers and directors to perform appraisals. Such cases would depend on a credit union's particular circumstances; an example would be a small credit union where the only qualified individual to perform appraisals is a loan officer, and separating this person from the loan and collection departments is impossible. It should be noted that directors and loan officers who perform appraisals in connection with federally-related transactions must be licensed or certified, as appropriate. In any case, the conflict provisions of § 701.21(c)(8) apply and prohibit directors and loan officers from receiving payment for the performance of appraisals for the credit union.

#### *Section 722.6—Professional Association Membership; Competency*

(a) *Membership in appraisal organizations.* The legislative history evidences an intent to prohibit discrimination against appraisers solely by virtue of membership or lack of membership in a particular appraisal organization. Accordingly, this proposed regulation prohibits any entity covered by title XI from basing decisions regarding the employment of appraisers solely on membership or lack of membership in an appraisal organization. Federally-insured credit unions should review the qualifications of appraisers rather than the qualification of appraisal organizations to ensure that a qualified individual is being employed. Membership in an organization may be considered; however, it may not be the sole determining factor in accepting or rejecting an appraiser.

(b) *Competency.* Not all appraisers are competent to perform every type of appraisal that will be needed in connection with federally-related transactions. For instance, an appraiser who is experienced in appraising shopping centers may not be competent to appraise a golf course. Credit unions should look beyond an individual's title to determine if he or she has the experience and training needed to perform the appraisal. This provision is not intended to prohibit an individual in every circumstance from appraising a type of property with which he or she is not familiar. However, in such instance, an appraiser may perform the appraisal only in accordance with the Competency Provision in the USPAP, which requires an appraiser to have both the knowledge and the experience required to perform a specific appraisal service competently. In addition, an individual who is not a state-certified or licensed appraiser may assist in the preparation of an appraisal if he or she is directly supervised by a licensed or certified appraiser, as appropriate, and the appraisal is approved and signed by a certified or licensed appraiser.

#### *Section 722.7—Enforcement*

Section 1120 of FIRREA vests each of the Federal financial institution regulatory agencies with the authority to bring an action for civil money penalties against a regulated institution within the agency's primary jurisdiction. The proposed regulation makes clear that additional enforcement remedies available to NCUA under the Federal Credit Union Act also apply. These can include civil money penalties and cease-

and-desist orders, as well as orders of removal and prohibitions against institutions and institution-affiliated parties. "Institution-affiliated parties" specifically includes, but is not limited to, appraisers.

#### Section 741.4

A technical amendment to § 741.4 is proposed to require that all federally insured credit unions comply with proposed part 722. A new § 741.4 would be inserted and the sections following it would be renumbered.

#### Paperwork Reduction Act

The proposed regulation contains a requirement for the collection of additional information and a maintenance of documentation by a federally-insured credit union. The proposed regulation requires submission of specific information on appraisals for a significant number of federally-related real estate transactions. The proposed regulation also requires a federally-insured credit union to maintain documentation on their determination of whether a property being appraised requires a complex 1-to-4 family residential property appraisal.

The paperwork requirements will be submitted to the Office of Management and Budget for review under the Paperwork Reduction Act. Written comments on these requirements should be forwarded directly to the OMB Desk Officer at the following address: OMB Reports Management Branch, New Executive Office Building, Room 3208, Washington, DC 20530, ATTN: Jerry Waxman.

#### Regulatory Flexibility Act

The NCUA Board hereby certifies that this proposed rule does not have a significant impact on a substantial number of small credit unions. Accordingly the Board has determined that a Regulatory Flexibility Analysis is not required.

#### Executive Order 12612

The proposed rule will apply to both Federal and federally-insured credit unions. The NCUA Board, pursuant to Executive Order 12612, has determined, however, that the proposed amendment will not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

#### List of Subjects in 12 CFR 722 and 741

Credit unions, Appraisals, State-certified and -licensed Appraisers.

By the National Credit Union Administration Board on February 7, 1990.  
**Becky Baker,**  
*NCUA Board Secretary.*

Accordingly, NCUA proposes to amend its regulations as follows:

1. Part 722 be added to read as follows:

#### PART 722—APPRASALS

Sec.

- 722.1 Authority, purpose, and scope.
- 722.2 Definitions.
- 722.3 Real estate-related financial transactions requiring a State-certified or -licensed appraiser.
- 722.4 Appraisal standards.
- 722.5 Appraiser independence.
- 722.6 Professional Association Membership; Competency.
- 722.7 Enforcement.

Authority: 12 U.S.C. 1766, 1789 and Pub. L. 101-73.

##### § 722.1 Authority, purpose, and scope.

(a) *Authority.* Part 722 is issued by the National Credit Union Administration ("NCUA") under title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA").

(b) *Purpose and Scope.* (1) Title XI provides protection for Federal financial and public policy interests in real estate-related transactions by requiring real estate appraisals used in connection with federally-related transaction to be performed in writing, in accordance with uniform standards, by appraisers whose competency has been demonstrated and whose professional conduct will be subject to effective supervision. This Part applies to all federally related transactions entered into by the National Credit Union Administration and by federally-insured credit unions.

(2) This regulation:

(i) Identifies which real estate-related financial transactions require the services of an appraiser;

(ii) Prescribes which categories of federally-related transactions shall be appraised by a state-certified appraiser and which by a state-licensed appraiser, and

(iii) Prescribes minimum standards for the performance of real estate appraisals in connection with federally-related transactions under the jurisdiction of the National Credit Union Administration.

##### § 722.2 Definitions.

(a) *Appraisal* means a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion as to the market value of an adequately-described property as of a specific date(s), supported by the

presentation and analysis of relevant market information.

(b) *Appraisal Foundation* means the Appraisal Foundation established on November 30, 1987, as a not-for-profit corporation under the laws of Illinois.

(c) *Appraisal Subcommittee* means the Appraisal Subcommittee of the Federal Financial Institutions Examination Council ("FFIEC").

(d) *Complex 1-to-4 family residential property appraisal* means an appraisal of a property which is atypical for the marketplace. For example, atypical factors may include:

- (1) Architectural style;
- (2) Age of improvements;
- (3) Size of improvements;
- (4) Size of lot;
- (5) Neighborhood land use;
- (6) Potential environmental hazard liability;
- (7) Leasehold interests;
- (8) Limited readily available comparable sales data or;
- (9) Other unusual factors.

(e) *Federally-related transaction* means any real estate-related financial transaction that (1) the National Credit Union Administration, or any federally-insured credit union, engages in, or contracts for; and (2) requires the services of an appraiser.

(f) *Market value* means the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, to the buyer and seller, each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:

- (1) Buyer and seller are typically motivated;
  - (2) Both parties are well informed or well advised, and each acting in what he considers his own best interest;
  - (3) A reasonable time is allowed for exposure in the open market;
  - (4) Payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto; and
  - (5) The price represents the normal consideration for the property sold unaffected by special or creative financing or sales.
- (g) "Real estate-related financial transaction" means any transaction involving:
- (1) The sale, lease, purchase, investment in or exchange of real property, including interests in property, or the financing thereof; or
  - (2) The refinancing of real property or interests in real property; or

(3) The use of real property or interests in real property as security for a loan or investment, including mortgage-backed securities.

(h) *State-certified appraiser* means any individual who has satisfied the requirements for state certification in a state or territory whose criteria for certification as a real estate appraiser currently meets the minimum criteria for certification issued by the Appraiser Qualification Board of the Appraisal Foundation. In addition, the Appraisal Subcommittee must not have issued a finding that the state's policies, practices, or procedures are inconsistent with Title XI of FIRREA. The National Credit Union Administration may, from time to time, impose additional qualification criteria for certified appraisers performing appraisals in connection with federally-related transactions within its jurisdiction.

(i) *State-licensed appraiser* means any individual who has satisfied the requirements for state licensing in a state or territory where the licensing procedures comply with Title XI of FIRREA and where the Appraisal Subcommittee has not issued a finding that the state's appraisal policies, practices, or procedures are inconsistent with Title XI. The NCUA may, from time to time, impose additional qualification criteria for licensed appraisers performing appraisals in connection with federally-related transactions within NCUA's jurisdiction.

(j) *Tract development* means a project of five units or more that is constructed as a single development.

(k) *Transaction value:* (1) For loans or other extensions of credit means the amount of the loan or extension of credit;

(2) For sales, leases, purchases, and investments in or exchanges of real property means the market value of the real property involved.

#### **§ 722.3 Real estate-related financial transactions requiring a state-certified - licensed appraiser.**

(a) *Appraisals not required.* An appraisal performed by a state-certified or -licensed appraiser is not required for: (1) Any real estate-related financial transaction in which the transaction value is \$15,000 or less; or (2) any real estate-related transaction in which a lien on real property has been taken as collateral solely through an abundance of caution and where the terms of the transaction as a consequence have not been made more favorable than they would have been in the absence of a lien.

(b) *Transactions requiring state certified appraisers.* (1) All federally-

related transactions, other than those involving appraisals of 1-to-4 family residential properties, shall require an appraisal by a state-certified appraiser.

(2) All appraisals of 1-to-4 family residential properties made in connection with federally-related transactions shall require a state certified appraiser if:

(i) The transaction value of the federally-related transaction entered into by NCUA exceeds \$1,000,000, or

(ii) For federally-related transactions entered into by federally-insured credit unions, other than those institutions operated by the NCUA as receiver, liquidator or conservator, the transaction value exceeds the lesser of (A) 10 percent of the credit union's regular reserves and undivided earnings or (B) \$1,000,000.

(iii) The property being appraised is determined to be a "complex 1-to-4 family residential property appraisal." The federally-insured credit union shall determine whether the property is atypical and shall make available, if requested by NCUA, appropriate evidence to support the determination.

(c) *Transactions requiring either a state-certified or -licensed appraiser.* All appraisals for federally-related transactions not requiring the services of a state-certified appraiser shall be performed by either a state-certified appraiser or a state-licensed appraiser.

#### **§ 722.4 Appraisal standards.**

(a) *Minimum standards.* For federally-related transactions, all appraisals as defined in § 722.2(a) of this regulation shall, at a minimum:

(1) Conform to the current Uniform Standards of Professional Appraisal Practice (USPAP) as adopted by the Appraisal Foundation, unless disapproved by NCUA, except that the Departure Provision of the USPAP does not apply to federally-related transactions;

(2) Be based upon the definition of market value as set forth in § 722.2(f) of this regulation;

(3) Be written and presented in a narrative format, or on forms, that satisfy all the requirements of this section. An appraisal shall be sufficiently descriptive to enable the reader to ascertain the estimated market value and the rationale for the estimate. The detail and depth of analysis in the appraisal report shall reflect the complexity of the real estate appraised;

(4) Analyze and report in reasonable detail any prior sales of the property being appraised that occurred within the following time periods:

(i) For 1-to-4 family residential property, one year preceding the date when the appraisal was prepared; or

(ii) For all other property, three years preceding the date when the appraisal was prepared;

(5) Analyze and report data on current rents and current vacancies for the subject property if it is and will continue to be income-producing;

(6) Analyze and report the appraiser's estimate of a reasonable marketing period for the subject property;

(7) Analyze and report on current market conditions and trends that will affect projected income or the absorption period, to the extent they affect the value of the subject property;

(8) Analyze and report appropriate deductions and discounts for any proposed construction, any completed properties that are partially leased, any properties that are leased at other than market rents, as of the date of the appraisal, any tract developments with unsold units;

(9) Include in the certification required by the USPAP, an additional statement that the appraisal assignment was not based on a requested minimum valuation, a specific valuation, or approval of a loan;

(10) Contain sufficient supporting documentation with all pertinent information reported so that the appraiser's logic, reasoning, judgment and analysis in arriving at a final conclusion indicate to the reader the reasonableness of the market value reported;

(11) Include a legal description of the real estate being appraised;

(12) Identify and separately value any personal property, fixtures, or intangible items that are not real property but are included in the appraisal, and discuss the impact of their inclusion, or exclusion, on the estimate of market value;

(13) Follow a reasonable valuation method that addresses the direct sales comparison, income, and cost approaches to market value, reconcile those approaches, and explain the elimination of each approach not used.

(b) *Unavailability of information.* If information required or deemed pertinent to the completion of an appraisal is unavailable, that fact shall be disclosed and explained in the appraisal report.

(c) *Additional standards.* Nothing contained herein shall prevent a federally-insured credit union from requiring additional appraisal standards if deemed appropriate.

**§ 722.5 Appraiser independence.**

(a) *Staff appraiser.* If an appraisal is prepared by a staff appraiser, that appraiser must be independent of the lending, investment, or collection functions and not involved, except as an appraiser, in the federally-related transaction, and have no direct or indirect interest, financial or otherwise, in the property. If the only qualified persons available to perform an appraisal are involved in the lending, investment, or collection functions of the credit union, the credit union shall take steps to ensure that the appraisers exercise independent judgment. Such steps include, but are not limited to, prohibiting an individual from performing an appraisal in connection with federally-related transactions in which the appraiser is otherwise involved.

(b) *Fee appraiser.* If an appraisal is prepared by a fee appraiser, the appraiser shall be employed directly by the federally-insured credit union or its agent, and have no direct or indirect interest, financial or otherwise, in the property or transaction.

**§ 722.6 Professional association membership; competency.**

(a) *Membership in appraisal organization.* A state-certified appraiser or a state-licensed appraiser may not be excluded from consideration for an assignment for a federally-related transaction solely by virtue of membership or lack of membership in any particular appraisal organization.

(b) *Competency.* A state-certified or licensed appraiser may not be considered competent solely by virtue of being certified or licensed. Any determination of competency shall be based upon the individual's experience and educational background as they relate to the particular appraisal assignment for which he or she is being considered.

**§ 722.7 Enforcement.**

CU's and institution-affiliated parties, including staff appraisers and fee appraisers, may be subject to removal and/or prohibition orders, cease-and-desist orders, and the imposition of civil money penalties pursuant to Section 1786 of the Federal Credit Union Act and FIRREA.

**PART 741—REQUIREMENTS FOR INSURANCE**

2. The authority citation for part 741 is continues to read as follows:

**Authority:** 12 U.S.C. 1757, 1766, 1781 through 1790 and Pub. L. 101-73, Section 741.10 is also authorized by 31 U.S.C. 3717.

**§ 741.4-741.11 [Redesignated as**

**§ 741.5-741.12]**

3. Sections 741.4, 741.5, 741.6, 741.7, 741.8, 741.9, 741.10, and 741.11 are redesignated as §§ 741.5, 741.6, 741.7, 741.8, 741.9, 741.10, 741.11, and 741.12, respectively.

4. A new § 741.4 is added to read as follows:

**§ 741.4 Appraisal requirements.**

Any credit union that is insured pursuant to title II of the Act must adhere to the requirements stated in part 722 concerning appraisals.

[FR Doc. 90-3484 Filed 2-15-90; 8:45 am]

BILLING CODE 7535-01-M

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****14 CFR Part 39**

[Docket No. 90-NM-13-AD]

**Airworthiness Directives; Boeing Model 737-300 and 737-400 Series Airplanes**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of Proposed Rulemaking (NPRM).

**SUMMARY:** This notice proposes to adopt a new airworthiness directive (AD), applicable to Boeing Model 737-300 and 737-400 series airplanes, which would require replacement of the rudder trim control knob and modification of the cockpit center console to raise the rear guard rail. This proposal is prompted by reports of inadvertent rudder trim actuation. This condition, if not corrected, could lead to an airplane taking off with an improperly trimmed rudder, which could result in reduction of controllability of the airplane or a rejected takeoff.

**DATES:** Comments must be received no later than April 11, 1990.

**ADDRESSES:** Send comments on the proposal in duplicate to the Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM-103, Attention: Airworthiness Rules Docket No. 90-NM-13-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

**FOR FURTHER INFORMATION CONTACT:**

Mr. Mark J. Perini, Systems and Equipment Branch, ANM-130S; telephone (206) 431-1944. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

**SUPPLEMENTARY INFORMATION:**

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments specified above will be considered by the Administrator before taking action on the proposed rule. The proposals contained in this Notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA/public contact, concerned with the substance of this proposal, will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this Notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 90-NM-13-AD." The postcard will be date/time stamped and returned to the commenter.

**Discussion**

There have been several reports of inadvertent rudder trim actuation on Boeing Model 737-300 and 737-400 series airplanes. Undesired commanded rudder trim has resulted from cockpit visitors and jumpseat riders inadvertently contacting the rudder trim control knob. Also, flight manuals and other objects placed on the cockpit center console may contact the rudder trim control knob, resulting in undesired commanded rudder trim. This condition, if not corrected, could lead to an airplane taking off with an improperly trimmed rudder, which could result in reduction of controllability of the airplane or a rejected takeoff.

Since the condition is likely to exist on other airplanes of this same type design, an AD is proposed which would require replacement of the rudder trim control knob with a smooth round fluted knob, and modification of the cockpit center console to raise the rear guard rail as a means to reduce the susceptibility of inadvertent rudder trim actuation. These actions would be required to be accomplished in a manner approved by the FAA.

There are approximately 641 Model 737-300 and 737-400 series airplanes of the affected design in the worldwide fleet. It is estimated that 362 airplanes of U.S. registry would be affected by this AD, that it would take an average of 10.5 manhours per airplane to accomplish the required actions, and that the average labor cost would be \$40 per manhour. It is estimated that modification parts would cost \$400 per airplane. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be \$286,840.

The regulations proposed herein would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this proposed regulation (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft evaluation prepared for this action is contained in the regulatory docket. A copy of it may be obtained from the Rules Docket.

#### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

#### The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations as follows:

#### PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

**Authority:** 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

#### § 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

**Boeing:** Applies to all Model 737-300 and 737-400 series airplanes, certificated in any category. Compliance required within the next 6 months after the effective date of this AD, unless previously accomplished.

To prevent inadvertent commanded rudder trim resulting in a decrease in takeoff controllability or a rejected takeoff, accomplish the following:

A. Replace the rudder trim control knob with a smooth round fluted knob approved by the Manager, Seattle Aircraft Certification Office, FAA, Northwest Mountain Region.

B. Add a guard rail of approximately 1.5 inches to the rear of the cockpit center console if no rail is currently installed, or, if a rail is currently installed, raise the cockpit center console rear rail to a height of approximately 1.5 inches, in accordance with procedures approved by the Manager, Seattle Aircraft Certification Office, FAA, Northwest Mountain Region.

C. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Seattle Aircraft Certification Office, FAA, Northwest Mountain Region.

**Note:** The request should be forwarded through an FAA Principal Maintenance Inspector (PMI), who will either concur or comment and then send it to the Manager, Seattle Aircraft Certification Office.

D. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

Issued in Seattle, Washington, on February 7, 1990.

**Darrell M. Pederson,**

*Acting Manager, Transport Airplane Directorate Aircraft Certification Service.*

[FR Doc. 90-3654 Filed 2-12-90; 4:07 am]

BILLING CODE 4910-13-M

#### 14 CFR Part 39

[Docket No. 89-ASW-66]

#### Airworthiness Directives; Aerospatiale (Societe Nationale Industrielle Aerospatiale) Model AS350 and AS355 Series Helicopters

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This notice proposes to adopt an airworthiness directive (AD) that would require installation of a protective cover on each main rotor servo control on Aerospatiale AS350 and AS355 series helicopters. The proposed AD is needed to prevent ice from forming within the servo distributor valve housing during cold weather operations which could result in loss of control of the helicopter.

**DATES:** Comments must be received on or before April 2, 1990.

**ADDRESSES:** Comments on the proposal may be mailed in duplicate to: Regional Rules Docket, Office of the Assistant Chief Counsel, FAA, Fort Worth, Texas

76193-0007, or delivered in duplicate to Office of the Assistant Chief Counsel, FAA, 4400 Blue Mound Road, Building 3B, Room 158, Fort Worth, Texas. Comments must be marked: Docket No. 89-ASW-66.

Comments may be inspected at the above location in Room 158 of Building 3B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

The applicable service bulletin may be obtained from Aerospatiale Helicopter Corporation, 2701 Forum Drive, Grand Prairie, Texas 75053-4005, or may be examined in the Regional Rules Docket.

#### FOR FURTHER INFORMATION CONTACT:

Mr. Samuel E. Brodie, FAA, Aircraft Certification Service, Policy and Procedures Group, ASW-112, Fort Worth, Texas 76193-0112, telephone (817) 624-5116.

#### SUPPLEMENTARY INFORMATION:

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments will be considered by the FAA before any final action is taken on the proposed rule. The proposal contained in this notice may be changed in light of comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments in the Regional Rules Docket, FAA, 4400 Blue Mound Road, Building 3B, Room 158, Fort Worth, Texas, for examination by interested persons. A report summarizing each FAA-public contact, concerned with the substance of the proposed AD, will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: Comments to Docket Number 89-ASW-66. The postcard will be date/time stamped and returned to the commenter.

There has been one accident attributed to servo control valve icing and nine reports of servo valve malfunctions attributed to ice forming within the distributor valve housing during cold weather operations. These

ice formations can lead to power loss and subsequently, loss of control of the helicopter. Since these conditions are likely to exist or develop on other helicopters of the same type design, the proposed AD would require installation of protection covers on the servo control valve of affected Aerospatiale Model AS350 and AS355 series helicopters. The manufacturer has issued Service Bulletin No. 67-11, dated March 23, 1989, which provides for installation of a protective cover on the servo valve. The proposed rule would require the new installation to be made in accordance with that bulletin.

The regulations proposed herein would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12812, it is determined that this proposal would not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

The FAA has determined that the proposed regulation would involve a fleet of 325 U.S. registered helicopters. Since the manufacturer is supplying the servo protective covers at no cost, the approximate cost for each aircraft would be 10 manhours of labor at \$40.00 an hour, with a total cost of \$400.00 per installation, for a total cost to the fleet of \$130,000. Therefore, I certify that this action: (1) Is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) if promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

#### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, and Safety.

#### The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations 14 CFR 39.13) as follows:

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 108(g) [Revised Pub. L. 97-449, January 12, 1983]; and 14 CFR 11.89.

2. Section 39.13 is amended by adding the following AD:

**Aerospatiale (Societe National Industrielle Aerospatiale):** Applies to Model AS350 and AS355 series helicopter with Dunlop main rotor servo controls, part number (P/N) AC 64182, AC 67030, AC 66442, and AC 67034 installed. (Docket Number 89-ASW-66)

Compliance required as indicated, unless already accomplished.

To prevent failure or malfunction of the main rotor servo controls due to icing, which could result in loss of power and, therefore, loss of control of the helicopter, accomplish the following:

(a) Within the next 300 hours' time in service, install the protective cover on each main rotor servo control in accordance with Part 2, Accomplishment Instructions of Aerospatiale Service Bulletin No. 67.11, dated March 23, 1989.

(b) An alternate method of compliance or adjustment of the compliance times which provide an equivalent level of safety, may be used if approved by the Manager, Rotorcraft Standards Staff, ASW-110, Rotorcraft Directorate, Aircraft Certification Service, Fort Worth, Texas 76193-0110.

Issued in Fort Worth, Texas, on February 2, 1990.

James D. Erickson,

*Manager, Rotorcraft Directorate, Aircraft Certification Service.*

[FR Doc. 90-3670 Filed 2-15-90; 8:45 am]

BILLING CODE 4910-13-M

#### 14 CFR Part 71

[Airspace Docket No. 89-AWP-20]

#### Proposed Alteration of VOR Federal Airway V-135; Nevada

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This notice proposes to alter VOR Federal Airway V-135 in the vicinity of Tonopah, NV, to provide the necessary airspace needed to protect V-135 from Restricted Area R-4807 Tonopah, NV. This amendment is the result of an action to realign the lateral limits of R-4807.

**DATES:** Comments must be received on or before March 30, 1990.

**ADDRESSES:** Send comments on the proposal in triplicate to:

Manager, Air Traffic Division, AWP-500  
Docket No. 89-AWP-20, Federal  
Aviation Administration, P. O. Box  
92007, Worldway Postal Center, Los  
Angeles, CA 90009.

The official docket may be examined in the Rules Docket, weekdays, except Federal holidays, between 8:30 a.m. and 5:00 p.m. The FAA Rules Docket is located in the Office of the Chief Counsel, Room 916, 800 Independence Avenue, SW., Washington, DC.

An informal docket may also be examined during normal business hours at the office of the Regional Air Traffic Division.

**FOR FURTHER INFORMATION CONTACT:** Alton D. Scott, Airspace Branch (ATO-240), Airspace-Rules and Aeronautical Information Division, Air Traffic Operations Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 287-9252.

#### SUPPLEMENTARY INFORMATION:

##### Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy aspects of the proposal. Communications should identify the airspace docket and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Airspace Docket No. 89-AWP-20." The postcard will be date/time stamped and returned to the commenter. All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in the light of comments received. All comments submitted will be available for examination in the Rules Docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

##### Availability of NPRM's

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Inquiry Center, APA-230, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 287-3484.

Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRM's should also request a copy of Advisory Circular No.

11-2A which describes the application procedure.

### The Proposal

The FAA is considering an amendment to part 71 of the Federal Aviation Regulations (14 CFR part 71) to alter V-135 located in the vicinity of Tonopah, NV, to provide the airspace needed to protect the lateral confines of V-135 from R-4807. This amendment is the result of an action to realign the lateral limits of R-4807. Section 71.123 of part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6F dated January 2, 1990.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

### List of Subjects in 14 CFR Part 71

Aviation safety, VOR federal airways.

### The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) as follows:

### PART 71—DESIGNATION OF FEDERAL AIRWAYS, AREA LOW ROUTES, CONTROLLED AIRSPACE, AND REPORTING POINTS

1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

### § 71.123 [Amended]

2. § 71.123 is amended as follows:

### V-135 [Amended]

By removing the words "INT Beatty 326° and Tonopah, NV, 198° radials;" and substituting the words "INT Beatty 326°T(310°M) and Tonopah, NV, 223°T(206°M) radials;"

Issued in Washington, DC on January 30, 1990.

Jerry W. Ball,

*Acting Manager, Airspace-Rules and Aeronautical Information Division,  
[FR Doc. 90-3671 Filed 2-15-90: 8:45 am]*

BILLING CODE 4919-13-M

### 14 CFR Part 71

[Airspace Docket No. 89-ASW-70]

### Proposed Establishment of Transition Area; Sallisaw, OK

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This notice proposes to establish a transition area at Sallisaw, OK. The development of a new standard instrument approach procedure (SIAP) to the Sallisaw Municipal Airport, utilizing the new Sallisaw Nondirectional Radio Beacon (NDB), has made this proposal necessary. The intended effect of this proposal is to provide adequate controlled airspace for aircraft executing this new SIAP to the Sallisaw Municipal Airport. Coincident with this proposal would be the changing of the status of the Sallisaw Municipal Airport from visual flight rules (VFR) to instrument flight rules (IFR).

**DATES:** Comments must be received on or before April 9, 1990.

**ADDRESSES:** Send comments on the proposal in triplicate to:

Manager, System Management Branch,  
Air Traffic Division, Southwest Region, Docket No. 89-ASW-70, Department of Transportation, Federal Aviation Administration, Fort Worth, TX 76193-0530

The official docket may be examined in the office of the Assistant Chief Counsel, Southwest Region, Federal Aviation Administration, 4400 Blue Mound Road, Fort Worth, TX.

**FOR FURTHER INFORMATION CONTACT:** Bruce C. Beard, System Management Branch, Department of Transportation, Federal Aviation Administration, Fort Worth, TX 76193-0530; telephone (817) 624-5561.

### SUPPLEMENTARY INFORMATION:

#### Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory

decisions on the proposal. Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposal. Communications should identify the airspace docket and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Airspace Docket No. 89-ASW-70." The postcard will be date/time stamped and returned to the commenter. All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in the light of comments received.

All comments submitted will be available for examination in the office of the Assistant Chief Counsel, 4400 Blue Mound Road, Fort Worth, TX, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

### Availability of NPRM's

Any person may obtain a copy of this notice of proposed rulemaking (NPRM) by submitting a request to the Manager, System Management Branch, Department of Transportation, Federal Aviation Administration, Fort Worth, TX 76193-0530. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRM's should also request a copy of Advisory Circular No. 11-2A which describes the application procedure.

### The Proposal

The FAA is considering an amendment to § 71.181 of the Federal Aviation Regulations (14 CFR part 71) to establish a transition area at Sallisaw, OK. The development of a new NDB-A SIAP to the Sallisaw Municipal Airport, utilizing the new Sallisaw NDB, has necessitated this proposal. The intended effect of this proposal is to provide adequate controlled airspace for aircraft executing this new SIAP to the Sallisaw Municipal Airport. Coincident with this proposal would be the changing of the status of the Sallisaw Municipal Airport from VFR to IFR. Section 71.181 of part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6F dated January 2, 1990.

The FAA has determined that this proposed regulation only involves an

established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

#### List of Subjects in 14 CFR Part 71

Aviation safety, Transition areas.

#### The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the FAA proposes to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) as follows:

#### PART 71—DESIGNATION OF FEDERAL AIRWAYS, AREA LOW ROUTES, CONTROLLED AIRSPACE, AND REPORTING POINTS

1. The authority citation for part 71 continues to read as follows:

**Authority:** 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

#### § 71.181 [Amended]

2. Section 71.181 is amended as follows:

##### Sallisaw, OK [New]

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of the Sallisaw Municipal Airport (latitude 35°26'23"N., longitude 94°48'10"W.), and within 1.5 miles each side of the 168° bearing of the Sallisaw NDB (latitude 35°23'55"N., longitude 94°47'39"W.), extending from the 6.5-mile radius area to 9 miles south of the Sallisaw Municipal Airport.

Issued in Fort Worth, TX on February 5, 1990.

**Larry L. Craig,**

*Manager, Air Traffic Division, Southwest Region.*

[FR Doc. 90-3672 Filed 2-15-90; 8:45 am]

BILLING CODE 4910-13-M

#### 14 CFR Parts 71 and 73

[Airspace Docket No. 89-AWP-19]

#### Proposed Alteration of Restricted Area R-4807 Tonopah, NV

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This notice proposes to alter the boundaries and change the using agency of Restricted Area R-4807 Tonopah, NV. A slight expansion of R-4807 is necessary to improve utilization of that area. The northwest portion of R-4807 does not provide sufficient maneuvering room for aircraft to utilize the westernmost targets in Ranges 71 and 76. The proposed expansion would provide for optimum utilization of established ranges. Part 71 would also be amended to include R-4807 in the Continental Control Area. The proposed expansion of R-4807 would require realignment of VOR Federal Airway V-135 which is being proposed under a separate action.

**DATES:** Comments must be received on or before March 30, 1990.

**ADDRESSES:** Send comments on the proposal in triplicate to:

Manager, Air Traffic Division, AWP-500, Docket No. 89-AWP-19, Federal Aviation Administration, P.O. Box 92007, Worldwide Postal Center, Los Angeles, CA 90009.

The official docket may be examined in the Rules Docket, weekdays, except Federal holidays, between 8:30 a.m. and 5:00 p.m. The FAA Rules Docket is located in the Office of the Chief Counsel, Room 916, 800 Independence Avenue, SW., Washington, DC.

An informal docket may also be examined during normal business hours at the office of the Regional Air Traffic Division.

#### FOR FURTHER INFORMATION CONTACT:

Linda Ullom, Military Operations Branch (ATO-140), Operations Division, Air Traffic Operations Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267-7683.

#### SUPPLEMENTARY INFORMATION:

##### Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire.

Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decision on the proposals. Comments are

specifically invited on the overall regulatory, aeronautical, economic and energy aspects of the proposals. Send comments on environmental and land use aspects to: Mr. Les Monroe, 554 CESS/DESPV, Nellis AFB, NV 89191-5000, Phone: (702) 652-4288.

Communications should identify the airspace docket and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Airspace Docket No. 89-AWP-19." The postcard will be date/time stamped and returned to the commenter. All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in the light of comments received. All comments submitted will be available for examination in the Rules Docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

#### Availability of NPRM's

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Inquiry Center, APA-230, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267-3484.

Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRM's should also request a copy of Advisory Circular No. 11-2A which describes the application procedure.

#### The Proposals

The FAA is considering amendments to parts 71 and 73 of the Federal Aviation Regulations (14 CFR parts 71 and 73) to expand Restricted Area R-4807 Tonopah, NV, by approximately 4.4 nautical miles at the northernmost point. The present narrow east-to-west dimensions of the northwestern portion of R-4807 severely limit the use of Range 71. The northern portion of Range 71 is not usable because the turn radius of aircraft operating at combat airspeeds does not permit the aircraft to remain within range airspace. Consequently, all tactical targets must be located in Range 71S. This situation limits the ability of crews to employ realistic attack and

defensive maneuvering. The proposed expansion of the R-4807 airspace boundaries to coincide with the present land boundaries would allow for additional tactical targets and increase the overall capacity of the Tactical Fighter Weapons Center Range Complex. The total airspace expansion as proposed would be limited to 55 square miles, all of which is over land owned by Nellis AFB or the Bureau of Land Management. Mitigating measures (i.e., restricting overflight to a minimum of 2,000 feet above ground in certain areas) provide for environmental protection of indigenous wildlife. This proposal would also amend part 71 to include R-4807 in the Continental Control Area, enabling joint use by nonparticipating aircraft when not required by the military. Implementation of this alteration would also require realignment of that segment of VOR Federal Airway V-135 between Tonopah and Beatty to provide protected airspace between the airway and the restricted area. The proposed realignment would add approximately eight flying miles to the Tonopah-Beatty airway segment. The V-135 realignment is being proposed under a separate action (Docket Number 89-AWP-20). Sections 71.151 and 73.48 of parts 71 and 73 of the Federal Aviation Regulations were republished in Handbook 7400.6F dated January 2, 1990.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore (1) Is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

#### List of Subjects in 14 CFR Parts 71 and 73

Aviation safety, Continental control area, and Restricted areas.

#### The Proposed Amendments

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend parts 71 and 73 of the Federal Aviation

Regulations [14 CFR parts 71 and 73] as follows:

#### PART 71—DESIGNATION OF FEDERAL AIRWAYS, AREA LOW ROUTES, CONTROLLED AIRSPACE, AND REPORTING POINTS

1. The authority citation for Part 71 continues to read as follows:

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

##### § 71.151 [Amended]

2. § 71.151 is amended as follows:

R-4807 Tonopah, NV [New]

#### PART 73—SPECIAL USE AIRSPACE

3. The authority citation for Part 73 continues to read as follows:

Authority: 49 U.S.C. 1348(a), 1354(a), 1510, 1522; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

##### § 73.48 [Amended]

4. § 73.48 is amended as follows:

R-4807 Tonopah, NV [Amended]

By removing the present boundaries and using agency and substituting the following:

*Boundaries.* Beginning at lat. 36°51'00"N., long. 116°33'30"W.; to lat. 37°26'30"N., long. 117°04'30"W.; to lat. 37°33'00"N., long. 117°05'38"W.; to lat. 37°53'00"N., long. 117°05'38"W.; to lat. 37°53'00"N., long. 116°55'00"W.; to lat. 37°47'00"N., long. 116°55'00"W.; to lat. 37°33'00"N., long. 116°43'00"W.; to lat. 37°33'00"N., long. 116°26'00"W.; to lat. 37°53'00"N., long. 116°26'00"W.; to lat. 37°53'00"N., long. 116°11'00"W.; to lat. 37°42'00"N., long. 116°11'00"W.; to lat. 37°42'00"N., long. 115°53'00"W.; to lat. 37°33'00"N., long. 115°53'38"W.; to lat. 37°33'00"N., long. 115°48'00"W.; to lat. 37°28'00"N., long. 115°48'00"W.; to lat. 37°28'00"N., long. 116°00'00"W.; to lat. 37°16'00"N., long. 116°00'00"W.; to lat. 37°16'00"N., long. 116°34'00"W.; to the point of beginning.

*Using agency.* U.S. Air Force, Commander, Tactical Fighter Weapons Center, Nellis AFB, NV.

Issued in Washington, DC, on February 5, 1990.

Harold W. Becker,

Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 90-3689 Filed 2-15-90; 8:45 am]

BILLING CODE 4910-13-M

#### ENVIRONMENTAL PROTECTION AGENCY

##### 40 CFR Part 52

[FRL-3724-7]

#### Approval and Promulgation of Implementation Plans; Indiana State Implementation Plan; Extension of Comment Period

**AGENCY:** United States Environmental Protection Agency (USEPA).

**ACTION:** Notice of extension of the public comment period.

**SUMMARY:** USEPA is giving notice that the public comment period for a notice of proposed rulemaking published December 11, 1989 (54 FR 50774), has been extended 30 days from date of publication. This notice proposed to disapprove a revision to the Indiana State Implementation Plan, which would redesignate St. Joseph and Elkhart Counties from nonattainment to attainment for ozone. USEPA is taking this action based on an extension request by a commentor.

**DATES:** Comments are now due on or before March 9, 1990.

**ADDRESS:** Air and Radiation Branch (5 AR-26), Environmental Protection Agency, Region V, 230 South Dearborn Street, Chicago, Illinois 60604.

**FOR FURTHER INFORMATION CONTACT:** Fayette Bright, (213) 886-6069.

Dated: February 7, 1990.

Valdas V. Adamkus,  
Regional Administrator.

[FR Doc. 90-3730 Filed 2-15-90; 8:45 am]

BILLING CODE 6560-50-M

#### FEDERAL MARITIME COMMISSION

##### 46 CFR Parts 515, 525, 530, 560 and 572

[Fact Finding Investigation No. 17; Docket No. 90-6]

#### Rates, Charges and Services Provided at Marine Terminal Facilities; Inquiry—Marine Terminal Operator Regulations

**AGENCY:** Federal Maritime Commission.

**ACTION:** Discontinuance of fact finding investigation; notice of inquiry.

**SUMMARY:** The Federal Maritime Commission ("Commission") is adopting certain recommendations of the *Report of Fact Finding Officer* in Fact Finding Investigation No. 17, *Rates, Charges and Services Provided at Marine Terminal Facilities* ("FF-17"), and is discontinuing that proceeding. The Commission is

initiating an inquiry to solicit public comment on a potential restructuring of its marine terminal operator regulations in the areas identified in FF-17 as warranting revision. The comments received will assist the Commission in proposing an appropriate rule to update its regulations in this area.

**DATES:** Discontinuance of fact finding investigation No. 17 effective February 16, 1990.

Comments due in Docket No. 90-6 April 17, 1990.

**ADDRESSES:** Comments (original and 15 copies) to:

Joseph C. Polking, Secretary, Federal Maritime Commission, 1100 L Street, NW., Washington, DC 20573, (202) 523-5725

**FOR FURTHER INFORMATION CONTACT:**

Robert G. Drew, Director, Bureau of Domestic Regulation, Federal Maritime Commission, 1100 L Street, NW. Washington, DC 20573, (202) 523-5796

**SUPPLEMENTARY INFORMATION:**

**Background**

The Shipping Act of 1984, 46 U.S.C. app. 1701-1720 ("1984 Act"), and the Shipping Act, 1916, 46 U.S.C. app. 801, *et seq.* ("1916 Act") (collectively, "Shipping Acts"), govern the marine terminal facilities and services that are provided in connection with oceanborne common carriage in U.S. foreign commerce (1984 Act) and in the U.S. domestic offshore trades (1916 Act). The marine terminal operator ("MTO") is the entity which furnishes the marine terminal facilities and services which are subject to the Shipping Acts.<sup>1</sup> The Shipping Acts require certain classes of MTO agreements to be filed with the Federal Maritime Commission ("Commission" or "FMC")<sup>2</sup> and set forth standards governing activities among MTO's, between MTO's and common carriers, and between MTO's on the one hand and shippers and consignees on the

other hand.<sup>3</sup> In order to administer these standards, the Commission's regulations require MTO tariffs to be published, and to be filed with the Commission.<sup>4</sup>

Since 1983, the Commission has been examining its regulation of MTO's in the light of the evolving operational and legislative environment in which they operate. This process began in 1983 with Docket No. 83-38, *Notice of Inquiry and Intent to Review Regulation of Ports and Marine Terminal Operators*.<sup>5</sup> That proceeding reviewed all regulations affecting MTO's. Among other things, it examined regulatory requirements for terminal tariffs and agreements to determine if they continued to be necessary.<sup>6</sup> In his September 26, 1984 *Report of Inquiry Officer—Part I*,<sup>7</sup> former Commissioner Robert Setrakian recommended that the Commission consider exempting certain classes of marine terminal agreements, but not revise its terminal tariff filing requirements.

Commissioner Setrakian's recommendation to exempt certain marine terminal agreements was implemented in Docket No. 85-10, *Marine Terminal Agreements*.<sup>8</sup> This proceeding ultimately exempted most classes of marine terminal agreements<sup>9</sup> from the 1984 Act's waiting period requirement and the 1916 Act's approval requirement, on condition that such agreements be filed with the Commission and noticed in the *Federal Register*.

Fact Finding Investigation No. 17, *Rates, Charges and Services Provided at Marine Terminal Facilities* ("FF-17"), was initiated in May 1987, concurrently with the issuance of the Final Rule in Docket No. 85-10, *supra*.<sup>10</sup> It addresses issues presented in a Petition for Declaratory Order ("Petition") concerning the emerging practice of MTO's providing combined terminal and stevedoring services to carriers under negotiated rates not on file with the

Commission.<sup>11</sup> Petitioner, and those commenting on the Petition, advised the Commission that the maritime industry's transition from breakbulk to containerized and Ro-Ro operations had blurred the traditional line of demarcation between MTO's subject to the Shipping Acts, and stevedores not subject to the Shipping Acts. Stevedores were said to have begun to offer services other than physically moving cargo on and off vessels, with stevedoring/MTO agreements often providing for a combination of terminal services and stevedoring services. Allegedly, it had become difficult to distinguish in which category a particular service would fall and whether it was subject to the Shipping Acts' jurisdiction and, in particular, the Commission's filing requirements.

After a preliminary staff investigation, the Commission denied the Petition, concluding that its regulations required MTO terminal service charges to be reflected separately in either a tariff or an agreement on file with the Commission. However, given the apparently widespread industry uncertainty concerning Commission requirements in this area, the Commission granted a limited *Waiver of Penalties* ("Waiver") for failure to file agreements, rates and charges for terminal services performed for water carriers.<sup>12</sup> The Commission subsequently extended the *Waiver* indefinitely, pending further inquiry into the matter.<sup>13</sup>

Given the absence of a factual record and the industry-wide uncertainty regarding MTO regulatory requirements, the Commission determined that a nonadjudicatory investigation pursuant to Subpart R of its rules of practice and procedure, 46 CFR 502.281, would be the most appropriate vehicle to gather information to facilitate the resolution of these issues, and therefore initiated FF-17's FF-17's Order of Investigation directed the named Investigative Officer (former Commissioner Thomas F. Moakley) to:

• Identify and make recommendations as to which services furnished at terminal facilities, as well as the rates and charges therefor, should be classified as rates and charges subject to the Commission's jurisdiction;

<sup>1</sup> Sec. 3(15) of the 1984 Act, 46 U.S.C. app. 1702(15), defines an MTO as:

" \* \* \* a person engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier.

MTO's are included in the definition of "other person" in sec. 1 of the 1916 Act, 46 U.S.C. app. 801:

" \* \* \* any person not included in the term "common carrier by water, in interstate commerce," carrying on the business of " \* \* \* furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water in interstate commerce.

<sup>2</sup> Sections 4, 5 and 6 of the 1984 Act, 46 U.S.C. app. 1703-1705; section 15 of the 1916 Act, 46 U.S.C. app. 814. The Commission's implementing regulations are set forth in 46 CFR parts 572 (1984 Act) and 560 (1916 Act).

<sup>3</sup> Sections 6 and 10 of the 1984 Act, 46 U.S.C. app. 1705, 1709; sections 15, 18 First and 17 of the 1916 Act, 46 U.S.C. app. 814-818.

<sup>4</sup> 46 CFR parts 515, 525 and 530.

<sup>5</sup> Docket No. 83-38 was conducted as part of the Commission's responsibilities under section 610 of the Regulatory Flexibility Act 5 U.S.C. 610, whereby the Commission's published 10-year plan to review all of its regulations (46 FR 33632, June 30, 1981) had designated former part 533 (currently part 515), *Filing of Tariffs by Terminal Operators*, for review in fiscal year 1983.

<sup>6</sup> 48 FR 41199, September 14, 1983.

<sup>7</sup> 49 FR 38987, October 2, 1984.

<sup>8</sup> Notice of Proposed Rulemaking, 50 FR 13817 (April 5, 1985); Final Rule, 52 FR 18692 (May 19, 1987).

<sup>9</sup> Marine terminal conference, interconference, discussion and joint venture agreements were not exempted.

<sup>10</sup> 52 FR 18743, May 19, 1987.

<sup>11</sup> Petition for Declaratory Order filed by International Transportation Services, Inc., F.M.C. — (1986), 23 S.R.R. 1005, served April 4, 1986.

<sup>12</sup> June 25, 1986 *Notice of Waiver of Penalties* (51 FR 23154); October 15, 1986 *Supplemental Notice of Waiver of Penalties* (51 FR 36755).

<sup>13</sup> May 19, 1987 *Second Supplemental Notice of Waiver of Penalties* (52 FR 18744).

- Determine the scope and impact of the Commission's filing requirements;
- Assess the advisability of exempting certain kinds of services or the rates therefor from the Commission's filing requirements; and
- Address other matters relevant to the Commission's resolution of these issues.

These issues were amplified in a notice issued by the Investigative Officer prior to the public hearings he held on the matter. FF-17's record was then developed through questionnaires, public hearings, port visits and written statements. Questionnaires were mailed to: (a) MTO's and stevedores; (b) ocean common carriers; and (c) shippers.<sup>14</sup> Public hearings were held in San Francisco, California; Washington, D.C.; and Houston, Texas. Fifty-one witnesses appeared at these hearings, representing a broad spectrum of port, MTO, stevedore and carrier interests. The Investigative Officer made informal visits to the Ports of Seattle and Tacoma, Washington; Portland, Oregon; Charleston, South Carolina; Savannah, Georgia; Tampa, Florida; and New Orleans, Louisiana. These visits included tours of local terminal/stevedoring facilities as well as discussions with terminal providers, operators and users at each port. Also, 36 written statements were submitted by various port, MTO, stevedore and carrier interests.

A draft was circulated to the proceeding's participants, eliciting comments from 14 participants. As a result of these comments, certain clarifying changes were made, primarily to the report's conclusions and recommendations. *The Report of Fact Finding Officer ("Report")* was served August 31, 1988.

The *Report's* record (*Report*, pp. 20-29) states that operations on today's marine terminals cannot be neatly divided into categories such as stevedoring or terminal operations, both of which services are performed by the same entity in most locations—particularly at container terminals—under negotiated, throughput rates which are not filed with the Commission. Most of FF-17's participants were of the opinion that the Commission should not regulate stevedoring services. The Investigative Officer found, however, that a requirement to separate the terminal portion of a throughput charge from the stevedoring portion would likely

<sup>14</sup> Responses were received from 147 MTO's and stevedores, 76 carriers, and 154 shippers, for a combined return rate of approximately 30 percent.

produce "arbitrary, meaningless figures." *Report*, p. 28.

The *Report* concluded (*Report*, pp. 46-50) that the modern practice of furnishing combined terminal and stevedoring services requires either expansion or contraction of the Commission's current regulation of terminal services, and that the record best supports the latter approach. To reduce the present scope of terminal regulation, the Investigative Officer endorsed the exemption of terminal/stevedoring "handling" rates and charges from tariff and agreement filing requirements as the best alternative suggested to achieve this end. He found that Commission regulation of marine terminal activities should primarily focus on ensuring reasonable, non-discriminatory access to marine terminal facilities, because the ability to control access to such facilities is the economic power susceptible to the greatest possible abuse. Moreover, he concluded, the complaint procedure available to aggrieved persons reduces the risk of exempting "handling" services from tariff/agreement filing requirements. The Investigative Officer found the rationale for regulating terminal facilities charges on the waterfront to be inapplicable to off-pier facilities, and that off-pier MTO's should therefore be exempted from all filing requirements.

The *Report* further found that by limiting the Commission's filing requirements to public or private facility "owners", the problem of combined facilities/services charges would be limited to a few operating ports and even fewer private terminal owners/operators. The *Report* also concluded that if this approach is adopted, "furnishers" of combined terminal facilities and services at "throughput" rates should be required to file the combined rates and charges, and provide a detailed listing of the services provided under the throughput rates.

On the basis of the foregoing record and conclusions, the *Report* made four recommendations.

1. The Commission should restructure its terminal tariff and agreement filing rules to:

(A) Limit tariff and agreement filing requirements to entities which own or exercise ultimate control over the access and use of marine terminal facilities.<sup>15</sup>

<sup>15</sup> The Shipping Acts encompass not only the furnishing of marine terminal facilities, but also the services of receiving, handling, storing or delivering of property at such facilities. Also, section 10(d)(2) of the 1984 Act, 46 U.S.C. app. 1709(d)(2), prohibits MTO's from agreeing with other MTO's or common carriers to boycott, or unreasonably discriminate in the provision of terminal services to, any common

(B) Continue filing requirements for:  
(1) Leases and other terminal facility use agreements; and

(2) Tariffs containing facilities charges offered to the general public by the entity "furnishing" the facility (i.e., those MTO's which would be subject to filing requirements under Recommendation No. 1(A)).

(C) Eliminate filing requirements for tariffs and service agreements reflecting rates for handling cargo on or across terminals and related services (e.g., cargo tracking, container/chassis repair, etc.), unless provided in combination with facilities by the entity "furnishing" the facilities (i.e., those MTO's which would be subject to filing requirements under Recommendation No. 1(A)), in which event the combined facilities/services charges would be filed,<sup>16</sup> detailing the services provided.

(D) Exempt off-pier MTO's from all tariff and agreement filing requirements.<sup>17</sup>

2. The Commission should reinforce its regulation of marine terminal conference/interconference and discussion agreements to ensure that:

(A) The membership of the agreements on file is current;

(B) Such agreements accurately reflect the understanding of the present parties; and

(C) The antitrust immunity conveyed by such agreements does not exceed the limits of the Commission's authority to grant such immunity.

3. The Commission should authorize the staff to utilize FF-17's record to supplement or complement other information collected pursuant to its responsibilities under section 18 of the 1984 Act.

4. The Commission should continue to present *Waiver of Penalties* for failure to file terminal service agreements and tariffs until the final disposition of the *Report's* recommendations.

#### The Need for a Notice of Inquiry

The *Report* provides a comprehensive and thoughtful analysis of a body of painstakingly-developed facts bearing

carrier or ocean tramp. However, "facilities," as used in the *Report*, apparently refers only to those facilities which consist of real property or improvements thereon.

<sup>16</sup> Given the difficulty in distinguishing between terminal services at contemporary facilities noted by the *Report's* record, and Recommendation No. 1(C)'s broad description of "handling cargo on or across terminals," the Commission interprets this aspect of Recommendation No. 1 to encompass stevedoring services provided to common carriers by entities which are otherwise MTO's.

<sup>17</sup> The *Report*, at p. 48, indicates that this exemption should be limited to " \* \* \* tariffs or agreements for terminal services or terminal usage."

on the issues posed by the emergence of combined terminal services/stevedoring services arrangements. As such, it provides the Commission with a solid basis to continue the process begun under FF-17 to address these issues.

Recommendation No. 1 is the *Report's* principal recommendation. It is based on the *Report's* conclusion that the Commission's MTO agreement and tariff rules should be revised to accommodate the emergence of combined terminal services/stevedoring services arrangements. The restructuring envisioned under the *Report* would represent a significant departure from current practice in two important respects. First, MTO filing requirements would be determined by the involved terminal's ownership/ultimate control and geographic location, rather than simply by the nature of its operations, as at present. Second, MTO's subject to filing requirements on this basis would be required to file both the "terminal" and "stevedoring" portions of combined terminal services/stevedoring services arrangements.

The Commission concurs with the *Report's* conclusion that a restructuring of its MTO agreement and tariff rules is warranted. However, before an actual proposal to restructure these rules is issued, we believe it would be beneficial to first attempt to narrow—to the extent practicable—the wide range of issues that need to be addressed in any such restructuring. Accordingly, the Commission is initiating this *Notice of Inquiry—Marine Terminal Regulations ("Inquiry")* to solicit public comment on the restructuring envisioned under Recommendation No. 1 of the *Report*, as well as on possible alternative restructurings.

The Commission has determined not to require public comment upon the balance of the *Report's* recommendations, either as a matter of substance or procedure.

Recommendation No. 2 (reinforcement of Commission regulation of marine terminal conference/interconference and discussion agreements) and Recommendation No. 4 (continuation of the *Waiver* until final disposition of the *Report's* recommendations) are noncontroversial and are being adopted by the Commission. No change to the Commission's present rules is necessary to implement these recommendations, which bear on internal Commission programs and policy. Recommendation No. 3 (utilization of FF-17's record for purposes of the recent *Section 18 Report on the Shipping Act of 1984*) has already been implemented in the course of preparing the *Section 18 Report*. The

materials developed by FF-17 served as a valuable adjunct to the information collected for the *Section 18 Report*.

#### Discussion

##### A. Scope of the Report's Recommended Restructuring

Recommendation No. 1 would entail substantial modification of the Commission's rules under 46 CFR Parts 515 (Terminal Tariffs), 560 (1916 Act Agreement Rules) and 572 (1984 Act Agreement Rules).<sup>18</sup> Presently, all MTO's under the Commission's jurisdiction are required to file agreements and tariffs. Absent the present *Waiver*, all MTO rates, charges, rules and regulations relating to or connected with the receiving, handling, storing, and/or delivering of property are required to be set forth in MTO tariffs filed with the Commission. Rates and charges for terminal services performed for water carriers pursuant to negotiated contracts are required to be filed with the Commission under the Shipping Acts' agreement procedures.

The restructuring envisioned by Recommendation No. 1 would base filing requirements not only on the functions performed, but also on the involved facilities' (a) ownership/control; and (b) location (*i.e.*, on-pier/off-pier). Facility ownership/control/location characteristics presently play no role in determining MTO filing requirements. Revising Commission filing regulations in the manner recommended would focus active Commission oversight programs upon those entities which actually own (or exercise ultimate control over the access and use of) waterfront marine terminal facilities furnished to carriers and the shipping public, rather than upon all MTO's, as at present.<sup>19</sup>

Facility-owning/controlling MTO's (for ease of reference in this *Inquiry*, "FOMTO's") would be subject to essentially the same regulatory requirements as are presently applicable to MTO's in general, with the following exceptions: (a) The need to file agreements and tariffs for stevedoring

<sup>18</sup> Conforming and/or clarifying revisions would also be required for Parts 525, *Free Time and Demurrage Charges on Import Property Applicable to all Common Carriers by Water*, and 530, *Truck Detention at the Port of New York*.

<sup>19</sup> The *Report*, at p. 49, appears to indicate that those entities which lease facilities from landlords, public or private, should be exempted from certain filing requirements, since the landlord retains ultimate control over the premises through the involved lease, license, assignment or permit. In other words, a tenant's leasehold interest in a marine terminal facility would not convey the "ultimate control" envisioned by the *Report* as a basis for triggering tariff/agreement filing requirements.

services (if provided by a FOMTO in combination with its terminal facilities) would be clarified in the affirmative; and (b) "Off-pier", non-waterfront operators would not be required to file either tariffs or agreements, irrespective of either the functions they perform or their ownership/control of the involved facilities.<sup>20</sup> On the other hand, non-facility-owning/controlling MTO's (for ease of reference in this *Inquiry*, "Non-FOMTO's") would be largely relieved of existing regulatory requirements, although their marine terminal facility use agreements with FOMTO's would still be filed by the involved FOMTO's. The 1984 Act's section 10 Prohibited Acts, and their 1916 Act counterparts under sections 16 First and 17, would continue to apply.

In broad outline, the following table illustrates the differing FOMTO/Non-FOMTO filing obligations which would apply to terminal facility and service transactions under the restructuring envisioned by Recommendation No. 1.

	Present filing requirements (All MTO's) <sup>21</sup>	Recommendation No. 1	
		FOMTO's	Non- FOMTO's
Terminal tariffs:			
On-pier terminal facilities.	Yes .....	Yes .....	No.
Off-pier terminal facilities.	Yes .....	No .....	No.
On-pier terminal services.	Yes .....	( <sup>22</sup> ) .....	No.
Off-pier terminal services.	Yes .....	No .....	No.
Stevedor- ing services.	No .....	( <sup>22</sup> ) .....	No.
Agreements with other persons subject to the 1916 or 1984 Acts:			
On-pier terminal facilities.	Yes .....	Yes .....	( <sup>23</sup> ) .....
Off-pier terminal facilities.	Yes .....	No .....	No.
On-pier terminal services.	Yes .....	( <sup>22</sup> ) .....	No.
Off-pier terminal services.	Yes .....	No .....	No.

<sup>20</sup> For the purpose of proffering Recommendation No. 1 for the public comment, "off-pier" facilities are defined to be facilities located outside a waterfront marine terminal facility's official check-in/check-out gate(s). Comments are also solicited on updating the definition of "port terminal facilities" under 46 CFR 515.6(b) in the manner suggested in the *Report's* "Conclusions."

	Present filing requirements (All MTO's) <sup>21</sup>	Recommendation No. 1	
		FOMTO's	Non-FOMTO's
Stevedoring services.	No <sup>24</sup> ..... ( <sup>22</sup> ).....	No.	

<sup>21</sup> Absent the current Waiver.<sup>22</sup> "Yes", if provided by a FOMTO in combination with its facilities.<sup>23</sup> "Yes", to the extent that a Non-FOMTO is reflected as a party in a FOMTO's facility-use agreement.<sup>24</sup> At least to the extent the Commission has never affirmatively asserted jurisdiction over stevedoring services.

### B. Major Issues

#### 1. Shipping Act Jurisdiction Over Stevedoring Services Provided by MTO's

Stevedores have never been held to be subject to the Commission's marine terminal tariff/agreement filing requirements, provided that their services are limited to stevedoring<sup>25</sup> and do not involve furnishing terminal facilities or services. The service of stevedoring arises from the vessel operator's legal obligations as a common carrier. Once cargo is tendered by a shipper to a carrier for waterborne transportation, the carrier is responsible for safely loading and stowing the cargo on board the vessel. Similarly, it is the carrier's responsibility to unload the cargo from the vessel, segregate it from other cargo and tender it for delivery to the consignee. These loading/stowing/unloading activities constitute the stevedoring services at issue in FF-17, and are included among the services a carrier is obligated to perform to fulfill its transportation contract. *American President Lines, Ltd., et al. v. Federal Maritime Board*, 317 F.2d 887 (D.C. Cir. 1962); *Sun-Maid Raisin Growers Ass'n v. United States*, 33 F. Supp. 959, 961 (N.D. Cal. 1940), aff'd 312 U.S. 667 (1941). See also *Assembling and Distributing Charge*, 1 U.S.S.B. 380, 384 (1935); *Terminal Rate Increases—Puget Sound Ports*, 3 U.S.M.C. 21, 23-24 (1948); and *Truck and Lighter Loading and Unloading Practices at New York Harbor*, 9 F.M.C. 505, 511 (1966).

While a single entity may act as both a terminal operator and a stevedore in connection with a common carrier by water, duties of each have been traditionally considered to be separate and distinct. Stevedores generally have

<sup>25</sup> I.e., hiring and furnishing longshore labor and related facilities and equipment for the transfer of cargo between a vessel and a point of rest on a marine terminal facility (the point of rest is the place at which inbound cargo is tendered for delivery to the consignee and outbound cargo is received from shippers for loading on a vessel).

no direct contact with the shipper or consignee of the cargo. Claims filed by cargo owners for theft or damage to cargo, whether at the hands of stevedores or the carrier, are placed against the carrier. In all respects, the stevedore is an agent of the carrier and, in fact, performs the loading, stowing and unloading services previously done by the ship's crew.

The Report sees no reason to deviate from existing policy and subject "pure" stevedores (*i.e.*, entities which furnish stevedoring exclusively, but no terminal facilities or services) to terminal tariff/agreement filing requirements, provided that such stevedores do not also furnish terminal facilities or services in connection with their vessel loading/unloading activities. If a FOMTO furnishes combined terminal and stevedoring services, Recommendation No. 1(C) of the Report suggests that the totality of the transaction should be filed. This is based upon the Report's conclusion that regulating only the "terminal" portion of a combined terminal services/stevedoring services arrangement is not a viable option because: (1) It is difficult to distinguish between terminal services and stevedoring services at most modern terminals; and (2) regulating one portion of a combined services arrangement is meaningless if the other remains unregulated.

Although not directly cited in the Report, two rationales may provide a basis to assert Shipping Act jurisdiction over the stevedoring services portion of combined terminal services/stevedoring services arrangements.

The first is articulated in *Henry Gillen's Sons Lighterage v. American Stevedores*, *supra*. ("Gillen's"), where respondent MTO's stevedoring practices were held to be subject to the requirement of section 17 of the 1916 Act that they observe just and reasonable practices in connection with the receiving, handling and delivering of property.<sup>26</sup>

Commission jurisdiction over respondents depends on respondents' status as carriers or other persons subject to the act—not upon the nature of the particular practices which are the subject of inquiry. When jurisdiction has been established, the Commission's authority extends to any of their acts and practices which are within the scope of the act. The Terminal Conference respondents are indisputably subject to the act; and the matters in issue, which are directly concerned with practices relating to the handling of cargo, are clearly within the Commission's authority with respect to

<sup>26</sup> The 1984 Act counterpart to section 17 of the 1916 Act is section 10(d)(1), 46 U.S.C. app. 1709(d)(1).

persons subject to the act. *American Export-Isbrandtsen Lines v. Federal Maritime Commission*, 389 F.2d 962, 972 (D.C. Cir. 1968); *California Stevedore & Ballast Co. v. Stockton Port District*, 7 F.M.C. 75, 81 (1962); and cf. *Grace Line v. Federal Maritime Board*, 280 F.2d 790 (2d Cir. 1960), cert. denied, 364 U.S. 933 (1961).

*Gillen's*, at 338.

The second rationale is that of "agreement completeness", as expressed under 46 CFR 572.103(g) and 572.406. Agreements filed under the 1984 Act must, among other things, "embody the complete present understanding of the parties" (Emphasis supplied).<sup>27</sup> Given the premise that the stevedoring portion of an MTO's combined terminal services/stevedoring services arrangement involves practices within the scope of the Act—*i.e.*, practices relating to the handling of cargo—it could be argued that the arrangement must include the stevedoring services portion to be considered complete.

This Inquiry therefore solicits comment on the stevedore jurisdictional issue.

#### 2. Competitive Impact

Recommendation No. 1 would (1) discontinue tariff and agreement filing requirements for Non-FOMTO's and Off-pier MTO's, and (2) retain these requirements for FOMTO's expanding them to include stevedoring services, if provided by a FOMTO in combination with its facilities. This Inquiry solicits public comment on the competitive impact of these two proposals, (1) as between Non-FOMTO's/Off-pier MTO's and FOMTO's; and (2) among similarly-situated customers of Non-FOMTO's/Off-pier MTO's.

In certain instances, and at some ports, the elements of facility ownership/control/location may distinguish those MTO's which generally stevedore (*i.e.*, Non-FOMTO's) from those which generally do not (*i.e.*, FOMTO's). However this Inquiry solicits comment on the question of whether such an approach would work equitably as a rule of general applicability for all circumstances at all ports for the purpose of differentiating filing requirements.

#### 3. Impact upon the Administration of the Acts

The Commission's administration of the 1916 and 1984 Acts consist of statutory requirements and procedures (*e.g.*, filing of agreements, tariffs, etc.), and the assignment of certain authority to the Commission (*e.g.*, the conduct of

<sup>27</sup> 49 FR 36371 (September 17, 1984).

adjudicatory investigations, rulemakings, regulations and orders, penalties, subpoenas, etc.). This process ensures that the Act's standards are enforced and, in turn, that the Act's objectives are realized. Disclosure (both to the Commission and the public) of activities subject to the Act enables the Commission, as well as those who might be directly or indirectly affected, to be continually aware of the existence, specific nature, and scope of activities governed by the Act's standards.<sup>28</sup>

The Non-FOMTO/Off-pier MTO filing exemption envisioned by Recommendation No. 1 would reduce disclosure. Such an exemption would roughly approximate the current *status quo* in the terminal industry under the *Waiver*, at least insofar as Non-FOMTO's terminal services are concerned.<sup>29</sup> An evaluation of the recommended exemption thus requires a complex balancing process, along with the ultimate determination that exempting some—but not all—MTO's from current regulatory requirements would neither substantially impair effective Commission regulation of Non-FOMTO's/Off-pier MTO's, nor be unjustly discriminatory as between the two classes of MTO's, nor substantially reduce the ability of FOMTO's to compete with Non-FOMTO's/Off pier MTO's.

In view of the foregoing, this *Inquiry* solicits public comment on the impact of Recommendation No. 1 of the *Report*, and that of alternative restructurings, upon the Commission's administration of the Shipping Acts.

#### C. Collateral Issues

##### 1. Tariff Filing Requirements for MTO Conferences Which Include Non-FOMTO's

Many Non-FOMTO's belong to MTO conference agreements which authorize the participants to discuss and agree upon common rates, charges and practices and which enjoy Shipping Act antitrust immunity.<sup>30</sup> As noted above,

<sup>28</sup> Given the potential costs involved in litigating the disclosure of information concerning Non-FOMTO/Off-pier MTO terminal facilities and services, the impact of the recommended Non-FOMTO/Off-pier MTO exemption (and alternative exemptions) on the 1984 Act's overall policy of minimizing regulatory cost should be considered.

<sup>29</sup> The *Waiver* is limited to terminal services provided to common carriers; Recommendation No. 1 would, however, also encompass Non-FOMTO/Off-pier MTO services provided to the shipping public. Non-FOMTO/Off-pier MTO terminal facilities generally, and off-pier operations by both FOMTO's and Non-FOMTO's.

<sup>30</sup> 14 of the 18 currently-effective MTO conference agreements include Non-FOMTO's in their membership; at least 10 of the 14—63 percent of the MTO conference "universe"—are either

the Commission has adopted Recommendation No. 2(C) of the *Report*, which urges reinforcement of Commission MTO conference/interconference/discussion agreement oversight over such agreements.

Recommendation No. 2(C) does not distinguish between FOMTO and Non-FOMTO conferences; rather, it treats all MTO conferences uniformly. Thus, Recommendation No. 1's suggested tariff filing exemption for Non-FOMTO's would impair the Commission's and public's ability to monitor the operation of MTO conference agreements.<sup>31</sup> Accordingly, the Commission does not interpret Recommendation No. 1 as contemplating the exemption of tariffs reflecting Non-FOMTO conference activity, and requests that public comment on Recommendation No. 1 consider it in the context.

##### 2. On-pier/Off-pier MTO's

Recommendation No. 1(D) urges exempting Off-pier MTO's from all tariff and agreement filing requirements. This recommendation is based on the following discussion in the *Report*:

The primary rationale for the [FOMTO/Non-FOMTO] distinction is that control of expensive, limited terminal facilities and the use of those facilities is subject to the greatest potential abuse, as demonstrated by the history of terminal practices in this country. That rationale would not appear to apply to off-pier facilities which are obviously not constrained by limited waterfront space nor by the expenses of constructing docks, wharves and other waterfront improvements such as dredged channels.

Therefore, while recognizing the paucity of factual data on off-pier terminals, the risk of exempting them from the regulatory structure suggested in this report would appear to be minimal. What is clear from this record is that there is only marginal compliance, at best, by off-pier operators with the Commission's current tariff and agreement filing requirements. (*Report*, p.42).

\* \* \* \* \*

wholly or predominantly Non-FOMTO in membership.

- 224-001941—Baltimore Marine Terminal Assoc.
- 224-001982—San Diego Terminal Operators Assoc.
- 224-002291—Tampa Maritime Assoc.
- 224-002592—Port Everglades Freight Handlers
- 224-003629—Port of Miami Freight Handlers
- 224-007544—San Francisco Bay Car Loaders Conf.
- 224-007925—North Atlantic Marine Terminal Lumber Conf.
- 224-008005—New York Terminal Conf.
- 224-008425—Port of Philadelphia Marine Terminal Assoc.
- 224-009545—Port of Detroit Operators' Assoc.

<sup>31</sup> The Shipping Acts require the Commission to make an affirmative finding that an exemption "will not substantially impair effective regulation by the Commission."

The rationale for regulating terminal facilities charges on the waterfront would not appear applicable to off-pier facilities. (*Report*, p. 48)

The Commission's jurisdiction over Off-pier MTO's was addressed in *Richmond Transfer and Storage Co.*, 23 F.M.C. 362, 371-372 (1980):

The advent of containerization and the lack of sufficient waterfront property or property alongside docks in recent years has led to the necessity for the performance of some traditional terminal services for ocean carriers at locations away from the docks. If all terminal operations for containerized cargoes were performed at the docks, presently the resulting congestion might bring terminal operations to a halt at some dock locations. Apparently it has become financially feasible to provide terminal services for ocean carriers in connection with containerized cargo at container freight stations away from the docks. Whether or not these terminal services are performed adjacent to or away from the docks, the services of the terminal operators in relation to the shipping public are the same, and equally should be and are subject to regulation.

The respondent \* \* \* chose to engage in the business of furnishing terminal facilities in connection with ocean common carriers at its offdock facility in Richmond, California. Since it performs the same service away from the docks as the ocean carrier or some other terminal operator would perform at the docks, the respondent is subject to regulation by the Federal Maritime Commission just the same as if it had chosen to engage in the terminal business at water's edge. (Emphasis supplied)

In view of the foregoing, this *Inquiry* solicits public comment on the issue of exempting Off-pier MTO's from all tariff and agreement filing requirements.

#### D. Alternative Approaches

The Commission solicits public comment not only on the restructuring envisioned under Recommendation No. 1 of the *Report*, but also on the two alternative approaches discussed below. Additionally, the Commission solicits suggestions for other alternatives it could consider as a basis to restructure its MTO agreement and tariff rules.

##### 1. Alternative 1—Full Filing Exemption

This alternative would exempt all MTO's (FOMTO's as well as Non-FOMTO's/Off-pier MTO's) from all filing requirements for marine terminal facilities and marine terminal services, as well as for stevedoring services provided by MTO's under combined terminal services/stevedoring services arrangements. This approach would avoid the FOMTO/Non-FOMTO competitive impact issues presented by Recommendation No. 1 of the *Report*, as

well as any jurisdictional issues that may exist with regard to stevedoring services provided by FOMTO's under combined terminal services/stevedoring services arrangements. It would not, however, avoid the issue of the competitive impact among similarly-situation MTO customers. Additionally, alternative surveillance techniques would have to be developed if agreement and tariff filings were made exempt. This *Inquiry* solicits public comment on the viability of this alternative.

#### 2. Alternative 2—Full Disclosure

A "full disclosure" alternative would be founded upon complete disclosure of all MTO activities and practices involved in the common carriage of goods subject to the Act's jurisdiction. Unlike the *Report's* recommendation with respect to Non-FOMTO's (but conforming to the *Report's* recommendation on FOMTO's), it would disclose all stevedoring activities, practices, rates, etc., which are provided under combined terminal services/stevedoring services arrangements. Such an approach would avoid the complex line-drawing that would be necessary to administer the Non-FOMTO/Off-pier MTO filing exemption.

Full disclosure would avoid the competitive impact issues and regulatory effects of the Non-FOMTO/Off-pier MTO exemptions. Delay in the processing of MTO agreements under this approach would not be a factor because the agreements would be effective upon filing under the current waiting period/approval exemptions. The Commission seeks comments, however, on the possible benefits of handling such transactions on a simplified basis, whereby disclosure could be satisfied—at the proponent's option—through the tariff filing process, instead of the current agreement filing/processing and associated *Federal Register* notice process.

The "full disclosure" alternative would continue the present requirement that all MTO practices, charges, etc., concerning terminal facilities/services furnished to the shipping public be reflected in the MTO's tariff. Unlike present practice, however, the "full disclosure" alternative could permit deviations to accommodate particular single-event or short-term requirements of an individual shipper/consignee, on condition that such deviations be referenced in the MTO's tariff (within 7–15 days of occurrence, for example) for the benefit of similarly-situated shippers/consignees.

Finally, given industry uncertainty with respect to MTO regulatory

requirements, this *Inquiry* solicits public comment on whether a recodification of the Commission's MTO agreement and tariff filing requirements under the same CFR Part would be useful.

#### IV. Conclusion

To facilitate the Commission's analysis of the issues which are the subject of this *Inquiry*, it is requested that comments address:

A. The restructurings envisioned under (1) Recommendation No. 1 of the *Report*; (2) the "full filing exemption" alternative discussed above; (3) the "full disclosure" alternative discussed above; and (4) any other alternatives commenters may suggest as viable approaches. For each alternative, it is requested that commenters specifically address, at a minimum, the following issues:

a. Shipping Act jurisdiction over stevedoring services provided to common carriers by water by MTO's otherwise subject to the Shipping Acts;

b. Competitive impact with regard to FOMTO's, Non-FOMTO's, Off-pier MTO's, the shipping public and carriers; and

c. Each alternative's impact on the Commission's administration of its statutory responsibilities with regard to MTO activities.

B. Filing requirements for tariffs reflecting Non-FOMTO conference activity;

C. The treatment of Off-pier MTO's;

D. Suggestions for updating the Commission's definition of marine terminal facilities under 46 CFR part 515;

E. The desirability of recodifying the Commission's MTO tariff and agreement rules under the same CFR part.

Finally, the Commission invites suggestions and comment on any additional proposals or considerations which may aid it in restructuring its MTO agreement and tariff rules.

*It is ordered*, That Fact Finding Investigation No 17, *Rates, Charges and Services Provided at Marine Terminal Facilities*, is hereby discontinued.

*It is further ordered*, That this Notice of Inquiry be published in the *Federal Register*.

By the Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 90-3625 Filed 2-16-90; 8:45 am]

BILLING CODE 6730-01-M

#### FEDERAL COMMUNICATIONS COMMISSION

##### 47 CFR Part 64

[Gen. Docket No. 90-64; FCC 90-74]

#### Indecent Communications by Telephone; Request for Comments on Proposed Restrictions

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** This Notice of Proposed Rulemaking (NPRM) seeks comments on the Federal Communications Commission's (FCC's) proposed rules governing restrictions on indecent telephone message services (commonly called dial-a-porn). The adoption of rules is necessitated by congressional revisions to section 223 of the Communications Act of 1934, as amended, 47 U.S.C. 223. The revisions were enacted as part of Pub. L. 101-166, to be cited as the "Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1990." Section 521 of that Appropriations Act is headed "Restoration and Correction of Dial-A-Porn Sanctions—Amendment." Pub. L. 101-166 begins at 103 Stat. 1159; the portion relating to dial-a-porn appears at 103 Stat. 1192-1194. The amendments were approved November 21, 1989, and take effect 120 days after the date of enactment of the Appropriations Act.

**DATES:** Pursuant to § 1.415 of FCC rules, 47 CFR 1.415, interested persons are afforded an opportunity to participate in this rulemaking proceeding through the submission, in writing, of data, views or arguments. Comments must be received by the FCC on or before March 2, 1990 and reply comments on or before March 13, 1990. The requirements for filing comments in a rulemaking proceeding are contained in § 1.419 of the FCC's rules, 47 CFR 1.419. Questions on how to file comments should be directed to the FCC's Consumer Assistance and Small Business Division, (202) 632-7000.

**ADDRESSES:** Federal Communications Commission, 1919 M Street, NW., Washington, DC 20554.

**FOR FURTHER INFORMATION CONTACT:** James M. Talens, Chief, Domestic Services Branch, Common Carrier Bureau, (202) 634-1800.

**SUPPLEMENTARY INFORMATION:** This is a summary of the FCC's NPRM in Gen. Docket No. 90-64, FCC 90-74, adopted February 13, 1990, and released February 13, 1990.

The full text of this proposal is available for inspection and copying during the weekday hours (excluding federal holidays) of 9 a.m. to 4:30 p.m. in the FCC's Public Reference Room, Room 239, 1919 M St., NW., Washington, DC. A copy also may be purchased from the FCC's duplicating contractor, International Transcription Services, 2100 M Street, NW., Suite 140, Washington, DC 20037, (202) 857-3800.

The following collection of information contained in this proposed rule has been submitted to the Office of Management and Budget for review under Section 3504(h) of the Paperwork Reduction Act. Copies of the submission may be purchased from International Transcription Services, 2100 M Street, NW., Washington, DC 20037, (202) 857-3800. Persons wishing to comment on this information collection should contact Eyvette Flynn, Office and Management and Budget, Room 3235 NEOB, Washington, DC 20503, (202) 395-3785. Copies of comments made should also be sent to the Federal Communications Commission, Office of Managing Director, Washington, DC 20554. For further information, telephone Jerry Cowden, FCC, (202) 632-7513.

*OMB number:* None.

*Title:* Regulations Concerning Indecent Communications by Telephone.

*Action:* New collection.

*Respondents:* Individuals or households; businesses (including small businesses).

*Frequency of Responses:* On occasion.

*Estimated Annual Burden:* The following estimates pertain to the reporting requirements proposed in the NPRM: 10,200 responses; 1,632 hours total; 10 minutes average.

*Needs and Uses:* The proposed rule amendments are designed to establish, among other things, a defense to prosecution by restricting access to adult message services by minors as required by Section 223 of the Communications Act of 1934, as amended. Affected respondents are subscribers, common carriers and providers of adult message services.

#### Summary of Notice

1. The Commission has promulgated rules in response to legislation concerning "dial-a-porn" services on three occasions. See First Report and Order in Gen. Docket 83-989, 49 FR 24,996 (1984); Second Notice of Proposed Rulemaking in Gen. Docket 83-989, 50 FR 10,510 (1985); Third Report and order in Gen. Docket 83-989, 52 FR 17,760 (1987).

2. This proceeding therefore represents the FCC's fourth attempt at

implementing rules pursuant to revised versions of section 223 of the Communications Act and intervening court decisions. Section 223 of the Communications Act of 1934, 47 U.S.C. 223, as amended by the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1990, Pub. L. 101-166, 103 Stat. 1159, 1192-1194 (Nov. 21, 1989), continues the outright ban on obscene communications for commercial purposes, but regulates (rather than prohibits) indecent telephone communications for commercial purposes.

3. Section 233(c) requires, with certain exceptions, that carriers block access to dial-a-porn services unless requested by a subscriber in writing to provide access. In addition, the legislation extends the penalties for both obscene and indecent telephonic communications to intrastate as well as interstate communications. Moreover, section 223(b) reestablishes an affirmative defense to prosecution for providers of indecent services that comply with FCC regulations.

4. The NPRM solicits comments on regulations proposed by the FCC to implement section 223 of the Communications Act.

5. Due to the statutory deadline, written comments must be received by the FCC on or before March 2, 1990, and reply comments on or before March 13, 1990.

#### Regulatory Flexibility Analysis

As required by section 603 of the Regulatory Flexibility Act, the FCC has prepared another initial regulatory flexibility analysis (IRFA) of the expected impact of the proposed rule changes on small entities. The IRFA is set forth in Appendix C of the NPRM. Written public comments are requested on the IRFA. The comments must be filed in accordance with the same filing deadlines as comments on the rest of the NPRM, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis.

#### Ex Parte Presentations

For purposes of this nonrestricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. Rules and regulations governing *ex parte* presentations are explained in paragraphs 15 through 17 of the NPRM.

#### Legal Basis

Sections 1, 4(i)-(j) and 223(b)(3) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i)-(j) and 223(b)(3); and 5 U.S.C. section 533.

#### List of Subjects in 47 CFR Part 64

Telephone common carriers, Telephone subscribers, Businesses, Obscene and indecent messages, Defense to prosecution.

Donna R. Searcy,  
Secretary.

[FR Doc. 90-3821 Filed 2-15-90; 8:45 am]

BILLING CODE 6712-01-M

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

#### 49 CFR Part 538

[Docket No. 89-09, Notice 02]

RIN 2127-AD02

### Minimum Driving Range for Dual Energy and Natural Gas Dual Energy Passenger Automobiles

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

**ACTION:** Notice of Proposed Rulemaking.

**SUMMARY:** This notice proposes to establish minimum driving range standards for the operation of dual energy and natural gas dual energy passenger automobiles on non-petroleum fuel. These standards are required by the 1988 amendments to the Motor Vehicle Information and Cost Savings Act. Ranges would be established for dual energy passenger automobiles, i.e., those capable of operating on alcohol and either gasoline or diesel fuel, and natural gas dual energy passenger automobiles, i.e., those capable of operating on natural gas and either gasoline or diesel fuel. A new passenger automobile which meets these ranges and other criteria established by the 1988 amendments qualifies to have its fuel economy calculated according to a special procedure for the purposes of determining the compliance of its manufacturer with the Corporate Average Fuel Economy Standards. The purpose of applying this procedure is to encourage the production of these passenger automobiles.

This notice also proposes procedures for manufacturers to follow in petitioning the agency to establish a lower driving range for a particular

model or models of natural gas dual energy passenger automobiles and for the agency to follow in establishing such lower ranges. It also would enable the agency to set lower ranges for specific models of natural gas dual energy automobiles on its own initiative.

This rulemaking was initiated on June 15, 1989 (54 FR 25539), with the publication of a request for comments on the minimum driving range criteria.

**DATES:** Comments must be received on or before March 19, 1990.

**ADDRESSES:** Comments should refer to the docket and notice numbers set forth above and be submitted (preferably in 10 copies) to the Docket Section, National Highway Traffic Safety Administration, Room 5109, 400 Seventh Street, SW, Washington, DC 20590. [Docket hours are from 9:30 a.m. to 4 p.m., Monday through Friday].

**FOR FURTHER INFORMATION CONTACT:**

Mr. Orron Kee, Office of Market Incentives, NRM-21, Room 5320, National Highway Traffic Safety Administration, 400 Seventh Street, SW, Washington, DC 20590, Telephone: (202) 366-0846.

**SUPPLEMENTARY INFORMATION:**

**Statutory background**

The fuel economy provisions of the Motor Vehicle Information and Cost Savings Act were amended by section 6 of the Alternative Motor Fuels Act of 1988 (Pub. L. 100-494, October 14, 1988) by adding a new section 513 regarding alternative energy automobiles. Section 513 provides, inter alia, that the Secretary of Transportation must establish, by April 16, 1990, two minimum driving ranges, one for new dual energy (alcohol/gasoline or diesel fuel) automobiles when operating on alcohol, and the other for natural gas dual energy (natural gas/gasoline or diesel fuel) automobiles when operating on natural gas. Section 513(h)(2)(D) requires that, in establishing the driving ranges, the agency must consider the purposes of the Alternative Motor Fuels Act of 1988, consumer acceptability, economic practicability, technology, environmental impact, safety, driveability, performance, and any other factors the Secretary deems relevant. From the Act and its legislative history, it is apparent that the driving ranges are to be low enough to encourage the production of alternative fuel passenger automobiles, yet not so low that motorists would be discouraged by a low driving range from actually fueling their alternative fuel vehicles with non-petroleum fuel. Section 513(h)(2)(C) provides that the range for dual energy automobiles may not be less than 200

miles. Section 513(h)(2)(B) allows passenger automobile manufacturers to petition the agency to set a lower range for a particular model or models than the established generally by the agency for all models. However, the agency may not set a minimum range of less than 200 miles for any model of dual energy automobile.

The minimum driving ranges would not be mandatory requirements, but one of several statutory criteria which a new passenger automobile must satisfy in order to fall within the definition in section 513(h) for dual energy automobiles or that for natural gas dual energy automobiles. The other criteria which a passenger automobile must meet in order to be considered a dual energy automobile are that it be an automobile:

- (i) which is capable of operating on alcohol and on gasoline or diesel fuel;
- (ii) which provides equal or superior energy efficiency, as calculated for the applicable model year during fuel economy testing for the Federal Government, while operating on alcohol as it does while operating on gasoline or diesel fuel; (and)
- (iii) which, for model years 1993 through 1995, and, if the Administrator of the Environmental Protection Agency determines that an extension of this clause is warranted, for an additional period ending not later than the end of the last model year for which section 513(b) and (d) applies, provides equal or superior energy efficiency, as calculated during fuel economy testing for the Federal Government, while operating on a mixture of alcohol and gasoline or diesel fuel containing exactly 50 percent gasoline or diesel fuel as it does while operating on gasoline or diesel fuel[.]

The other criteria which a passenger automobile must meet in order to be considered a natural gas dual energy automobile are that it be an automobile:

- (i) which is capable of operating on natural gas and on gasoline or diesel fuel; (and)
- (ii) which provides equal or superior energy efficiency, as calculated for the applicable model year during fuel economy testing for the Federal Government, while operating on natural gas as it does while operating on gasoline or diesel fuel[.]

As dual energy automobiles or natural gas dual energy automobiles, vehicles would qualify for special treatment in the calculation of their fuel economy for purposes of their manufacturers' compliance with the Corporate Average Fuel Economy Standards. The fuel economy of a dual energy passenger automobile would be the harmonic average of two values, the automobile's fuel economy when operating on gasoline or diesel fuel, and its fuel economy when operating on alcohol. Section 513(a) provides that, for the purposes of calculating that latter value,

a gallon of alcohol is considered to contain 0.15 gallons of fuel. Thus, an automobile that runs 20 miles on a gallon of alcohol would be considered to have a fuel economy of 133 miles per gallon ( $1/(.15) \times (20)$ ) when operating on alcohol. Similarly, the fuel economy of a natural gas dual energy passenger automobile would be the harmonic average of two values, the automobile's fuel economy when operating on gasoline or diesel fuel, and its fuel economy when operating on natural gas. Section 513(c) provides that, for the purposes of calculating the fuel economy of an automobile while operating on natural gas, 100 cubic feet of natural gas is considered to contain 0.823 gallons equivalent of natural gas and a gallon equivalent of natural gas is considered to contain 0.15 gallons of fuel.

Manufacturers can take advantage of these special calculation procedures in model years 1993 through 2004. The agency is authorized to extend this period up to an additional four years if it issues a rule for that purpose before January 1, 2002.

Section 513(g) limits the benefit that a manufacturer can receive in any single model year from producing automobiles that satisfy either definition. The total increase permitted in a manufacturer's Corporate Average Fuel Economy (CAFE) is 1.2 miles per gallon in any of model years 1993 through 2004 in which the manufacturer produced those automobiles and 0.9 miles per gallon in any of model years 2005 through 2008, if the Secretary determines that an extension of the provision beyond model year 2004 is warranted.

The agency notes that the statute does not require that all or even some minimum number or percentage of a manufacturer's passenger automobiles be capable of achieving the minimum driving ranges in order for any of its automobiles to qualify for the incentives. However, automobiles that do not meet the applicable minimum driving range could not qualify.

Section 513 also specifies that the driving range calculation "be based on the combined Environmental Protection Agency (EPA) city/highway fuel economy as determined for average fuel economy purposes for such automobiles." While section 513 does not expressly mention either adjusted (i.e., reduced to more accurately reflect typical values achieved in "real world" driving) or unadjusted combined fuel economy for the purpose of assigning a fuel economy value to each model type, NHTSA believes that the Act leaves no option but to use the unadjusted values. Section 513 (b) and (d) specify that the

measurements are to be made under section 503(d). The latter provides that, except for the purposes of labeling under section 506, the procedures used shall be those "utilized by the EPA Administrator for model year 1975 \* \* \* or procedures which yield comparable results." Those procedures specify the use of unadjusted values.

#### Request for comments

As a first step in implementing the mandate to establish driving range criteria, the agency published a notice requesting comments on June 15, 1989 (54 FR 25539). The notice asked several questions regarding dual energy passenger automobiles and natural gas dual energy passenger automobiles relative to the following criteria: consumer acceptability; economic practicability; technology; environmental impact; safety; driveability; and performance.

Comments were received from six manufacturers and two natural gas associations: Ford; Chrysler; General Motors (GM); Volkswagen of America (Volkswagen); Toyota Motor Corporate Services of North America (Toyota); Porsche AG and Porsche Cars North America, Inc. (Porsche); the National Gas Vehicle Coalition; and the American Gas Association (AGA). Volkswagen provided comments on behalf of Volkswagen AG and Audi AG, West Germany. These comments were carefully considered in the development of this proposal.

#### *Proposed driving range for dual energy automobiles*

The agency is proposing that an alcohol/gasoline or alcohol/diesel fuel automobile must be able to drive a minimum of 200 miles on one tank of alcohol fuel in order to be treated as a dual energy automobile and thus qualify for the incentive provided in section 513. The agency believes that this level would satisfy the twin goals of being low enough to encourage the production of dual energy passenger automobiles, yet high enough to ensure that motorists would not be discouraged from actually fueling and driving those automobiles on alcohol.

If the minimum driving range is to provide encouragement to manufacturers, the agency believes that the range must be set at a level that would not necessitate their incurring substantial costs for fuel tank and structural changes in order to achieve that range. Based on these considerations and the manufacturers' comments to the previous notice, the agency tentatively concluded 200 miles would be an appropriate minimum

driving range to propose. The costs, which would be primarily limited to those for the installation of components such as lines, valves, sensors, and injectors, would range from \$210 to \$340. Additionally, this amount includes the cost of a manufacturer's switching to materials such as stainless steel to avoid the corrosive effects of methanol. Those costs are independent of the magnitude of vehicle range. The 200-mile range could be achieved without any increase in the size of existing fuel tanks, which would be used for both types of fuel. For these reasons, the agency believes the proposed range is consistent with available technology.

GM recommended a minimum driving range of 200 miles based on an analysis of its 1989 passenger automobile models which assumed that these models had been converted to methanol dual energy automobiles equipped with existing fuel tank sizes. The analysis of the driving range for these vehicles showed that nearly 70 percent of the potential dual fuel methanol passenger cars were above a 250-mile range, about 30 percent were between the 200-mile and 250-mile range, and that none were below the 200-mile minimum driving range.

Ford recommended that the minimum driving range be established no higher than 250 miles, based upon existing estimates of methanol vehicle fuel economy and available fuel tank capacities. Ford computed driving ranges for its current model offerings with methanol as the fuel and no change to the capacity of the fuel tank. The driving ranges were: 266 miles as the average; 204 miles as the minimum; and 329 miles as the maximum. Ford determined that 79.7 percent of its current models could achieve a 250-mile minimum range.

Chrysler believed that the driving range should be set at 200 miles, but provided no specific information in support of this recommendation.

Volkswagen and Toyota recommended a minimum driving range of 200 miles. Both manufacturers stated that it is unnecessary to further regulate the minimum driving range for dual energy passenger automobiles since the Act requires a minimum driving range of no less than 200 miles. Similarly, they argued that a technology-forcing regulation is unnecessary since manufacturers, in order to fulfill their responsibilities under this act and to improve marketability, will strive to extend the driving range.

Porsche recommended an adjusted value of 225 miles, which is equivalent to an unadjusted value of about 265 miles. The manufacturer provided no justification for establishing this value.

In evaluating the consumer acceptability and practicability of dual energy automobiles, NHTSA can conceive advantages if dual fuel automobiles had fuel tanks larger than those in current automobiles so as to allow an automobile to drive a typical workweek travel distance of 300 miles/ week on a single tankful of alcohol fuel. Installing a larger tank would also increase the gasoline or diesel fuel driving range.

However, NHTSA believes that setting a minimum driving range significantly higher than 200 miles would necessitate a fuel tank that would be significantly larger than current tanks. In order to install a tank of that size, a manufacturer would have to substantially redesign its automobiles. The costs of doing so could be significant. In their comments, the manufacturers expressed a reluctance to redesign their automobiles and install larger tanks in order to achieve an alcohol driving range equivalent to that of a petroleum fuel passenger automobile. They stated that such a redesign could be extremely expensive and could make it necessary to recertify compliance with applicable Federal safety standards (e.g., FMVSS 301, Fuel System Integrity). Further, the price increase for obtaining that convenience might discourage consumers from purchasing dual fuel automobiles in the first place. NHTSA specifically requests comments on the magnitude of costs associated with redesigning and installing larger fuel tanks, and on the costs of recertification.

The proposed decision to set a driving range which could be met without installing larger fuel tanks has a number of additional implications. First, it means that the driving range of dual energy automobiles on alcohol would be less than the driving range of current automobiles on gasoline or diesel since the energy content of alcohol fuels is less than that of gasoline or diesel. The ranges for the 25 top selling gasoline-fueled cars for MY 1988 averaged 405 miles. The agency believes that the benefits of increased performance capabilities (primarily in terms of better acceleration) of vehicles with alcohol fuel would offset, to some extent, the shorter driving range when they are operated on alcohol. However, customers may expect a certain minimum level of convenience in terms of the driving range, regardless of vehicle performance.

Second, it means that automobile manufacturers would not have to make compensatory design changes to ensure that the weight of a larger tank loaded

to capacity with fuel would not adversely affect the braking, handling or performance of existing automobiles. A larger tank would exacerbate the variation in a vehicle's weight between the times that it has a full tank and the times that it has a nearly empty one. Manufacturers must design vehicles to take into account the effects which such variations in vehicle weight have on vehicle handling and braking. In addition, manufacturers would have to recertify that the vehicle, when loaded to its maximum weight, still meets all applicable safety standards.

Third, the agency believes that the driveability of a dual fuel alcohol vehicle could be penalized by a requirement for a driving range equivalent to that of a gasoline-fueled vehicle because of increased weight for tanks and fuel.

#### *Proposed driving range for natural gas dual energy automobiles*

The Act also requires that a minimum driving range be established for natural gas dual energy automobiles, although it does not specify that the range must equal or exceed some minimum value. The agency is proposing a range of 100 miles.

NHTSA believes that a 100-mile range would not lead to the production of vehicles with so low a natural gas operating range that it would impede the development and sale of natural gas dual energy vehicles. The agency notes that a natural gas dual energy vehicle would still have the gasoline fuel tank as a range extender. In addition, the 100-mile requirement represents a minimum range that would likely be exceeded by vehicle manufacturers. Market incentives will assure that vehicles will not be produced unless companies are satisfied with their capabilities.

The proposed range is consistent with the public comments submitted in response to the request for comments. The NGV Coalition and the AGA recommended that the agency set no minimum value; however, the agency notes that this would not fulfill its obligation under the law. The AGA suggested that if a minimum range is established, that it be between 100 and 200 miles, particularly if the range were to be reviewed at a later date, but provided no specific reason for selecting these values. GM calculated that if its passenger cars carried a volume of natural gas equal to their current fuel tank volumes, the driving range of most passenger cars would be below 125 miles.

Based on available information, the agency tentatively concludes that current natural gas converted passenger

cars can achieve the proposed 100-mile range. Since natural gas dual energy passenger automobiles require two separate tanks, i.e., one for gasoline and one for natural gas, space must be found for the separate natural gas tank. Natural gas tanks are generally mounted in the rear of the automobile; however, in some automobiles, natural gas tanks are mounted beneath the automobile. A natural gas fuel line is connected to the engine's existing fuel system through regulated mixer equipment. A fuel valve is installed on the dash which permits selection of either natural gas or gasoline operation.

A common natural gas storage tank for current passenger car conversions holds 300 cubic feet of natural gas which is equivalent in energy content to about 3 gallons of gasoline. This tank is approximately 14 inches in diameter and 34 inches long, and weighs about 75 to 125 pounds depending on the tank material. The size of storage tanks needed to achieve any given range would vary among different vehicles. On average, the cost of natural gas fuel tanks needed to achieve a 100 mile range would be from \$386-\$579, depending on design and construction material.

In order to achieve a range higher than that proposed, vehicles would have to be equipped with additional storage tanks. Doing this would pose significant problems since weight and available space are limiting factors. As noted above, for the 100-mile range, each additional tank would cost \$386 to \$579 and add \$46 to lifetime fuel costs due to the added weight. In addition, these tanks would reduce available trunk space by about 3.4 cubic feet. The addition of an extra natural gas tank would require a further reduction in the trunk/storage space or a major vehicle redesign. The added weight would also have a negative impact on vehicle performance and driveability.

The agency believes that the proposed range is sufficient to meet the needs of the likely purchasers of natural gas dual energy automobiles. The agency agrees with the majority of the commenters that the most likely passenger automobiles that would be converted to burn natural gas are fleet passenger automobiles and taxis because of their high annual fuel consumption and access to central company-owned refueling facilities. Access to such facilities would enable these companies to accommodate the proposed range. The proposed range might be less adequate for private owners of natural gas passenger automobiles since they may have limited access to natural gas refueling facilities. Therefore, for the

private owner, driving range is likely to be a major factor in the selection of a natural gas dual energy automobile until refueling facilities are more plentiful. The agency believes that the proposed range represents an achievable level, consistent with available technology which would not be unduly impractical or have negative impacts upon consumer acceptability, vehicle driveability or performance.

#### *Safety considerations*

Presently, the agency is not aware of any significant safety risks associated with alcohol or natural gas fuel for dual energy passenger automobiles attributed specifically to the magnitude of vehicle driving range or fuel tank size. All gasoline and diesel powered automobiles are required to comply with FMVSS No. 301; *Fuel System Integrity*. Methanol-powered vehicles would likewise be required to comply with Standard 301. The natural gas fuel system of a natural gas dual energy vehicle would not be required to comply with Standard 301 because that standard applies only to vehicles which use a fuel having a boiling point above 32° F, while natural gas has a boiling point below 32° F. Nevertheless, should any safety considerations become pertinent, the agency will analyze them and take appropriate action.

#### *Procedures establishing lower driving ranges for particular models of natural gas dual energy automobiles*

Section 513(h)(2)(B)(i) requires that the rule establishing the driving ranges also allow the agency to determine that a specific model or model type may have a lower range than the generally established range and establish procedures for manufacturers to petition the agency to specify such a lower range. As noted above, section 513(h)(2)(B)(ii) provides that lower ranges may not be established for dual energy automobiles if the agency selects the 200 mile statutory minimum as the driving range for those automobiles. Since this notice proposes that minimum value, the proposed petitioning procedures apply only to natural gas dual energy automobiles. If the agency were to establish a higher driving for dual energy automobiles in the final rule, it would also make the procedures applicable to those automobiles.

The proposal specifies that petitioning manufacturers must address each of the factors which the agency is required by section 513(h)(2)(D) to take into account in establishing lower driving ranges, i.e., the purposes of the Alternative Motor Fuels Act of 1988, consumer

acceptability, economic practicability, technology, environmental impact, safety, driveability, performance, and any other factors the agency deems relevant. This notice does not propose any additional factors.

Following its receipt of a petition, the agency would publish a notice summarizing the petition and inviting public comment. Then the agency would consider the comments and other available information and publish a final decision in accordance with section 513(h)(2)(D).

#### *Regulatory impacts*

The agency has analyzed the economic and other effects of this proposal and determined that they are neither "major" within the meaning of Executive Order 12291 nor "significant" within the meaning of the Department of Transportation regulatory policies and procedures. However, the agency has prepared a regulatory evaluation that quantifies the potential impacts of this proposal, and has placed it in the public docket.

In accordance with the Regulatory Flexibility Act, NHTSA has evaluated the effects of this proposed action on small entities. Based upon this evaluation, I certify that the proposed amendments would not have a significant economic impact on a substantial number of small entities. To the extent that any vehicle manufacturers qualify as small entities, their number would not be substantial. Moreover, conversion of vehicles to dual fuel status with the minimum ranges that would be established by this regulation will be voluntarily undertaken in order to achieve beneficial CAFE treatment of those vehicles. Therefore, no significant costs are being forced on any manufacturer. Accordingly, preparation of a preliminary regulatory flexibility analysis is not required.

The agency has also analyzed this rule for the purpose of the National Environmental Policy Act, and determined that it would not have any significant impact on the quality of the human environment. The agency tentatively concludes that increased evaporative emissions due to added fuel volume would be the most important environmental impact attributed to the enlargement of fuel tank size of dual energy vehicles operating on alcohol fuel. However, the minimum range proposed would not make it necessary for dual energy automobiles to have enlarged fuel tanks. Natural gas dual energy passenger automobiles should not have increased evaporative emissions since the natural gas tanks do

not normally vent to the atmosphere. All dual energy cars are required to meet EPA emissions standards, of course, using the worst case fuel for each type of test. Should other environmental impacts become known, the agency will present analyses of the significance of these impacts. The agency specifically requests comments on the amount of aldehyde emissions released by vehicles operating on methanol, and the consequences of these emissions.

The requirements contained in § 538.7 of this proposal, concerning petitions for reduction of minimum driving range for specific models of natural gas dual energy automobiles, are considered to be information collection requirements, as that term is defined by the Office of Management and Budget (OMB) in 5 CFR part 1320. Accordingly, these proposed requirements will be submitted to OMB for its approval in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Comments on the proposed information collection requirements should be submitted to: Office of Management and Budget, Office of Regulatory Affairs, Washington, DC 20503, Attention: Desk Officer for NHTSA. It is requested that comments sent to OMB also be sent to the NHTSA rulemaking docket for this proposed action.

Finally, this rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that the proposed rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

#### *Comments*

Interested persons are invited to submit comments on the proposal. It is requested but not required that 10 copies be submitted.

All comments must not exceed 15 pages in length. (49 CFR 553.21). Necessary attachments may be appended to these submissions without regard to the 15-page limit. This limitation is intended to encourage commenters to detail their primary arguments in a concise fashion.

If a commenter wishes to submit certain information under a claim of confidentiality, three copies of the complete submission, including purportedly confidential business information, should be submitted to the Chief Counsel, NHTSA, at the street address given above, and seven copies from which the purportedly confidential information has been deleted should be submitted to the Docket Section. A request for confidentiality should be accompanied by a cover letter setting

forth the information specified in the agency's confidential business information regulation. 49 CFR part 512.

All comments received before the close of business on the comment closing date indicated above for the proposal will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Comments received too late for consideration in regard to the final rule will be considered as suggestions for further rulemaking action. Comments on the proposal will be available for inspection in the docket. The NHTSA will continue to file relevant information as it becomes available in the docket after the closing date, and it is recommended that interested persons continue to examine the docket for new material.

Those persons desiring to be notified upon receipt of their comments in the rules docket should enclose a self-addressed, stamped postcard in the envelope with their comments. Upon receiving the comments, the docket supervisor will return the postcard by mail.

#### List of Subjects in 49 CFR Part 538

Energy conservation, Gasoline, Imports, Motor vehicles.

In consideration of the foregoing, 49 CFR part 538 is proposed to be added as follows:

#### PART 538—DRIVING RANGES FOR DUAL ENERGY AND NATURAL GAS DUAL ENERGY PASSENGER AUTOMOBILES

Secs.

- 538.1 Scope.
- 538.2 Purpose.
- 538.3 Applicability.
- 538.4 Definitions.
- 538.5 Minimum driving range.
- 538.6 Measurement of driving range.
- 538.7 Petitions for reduction of minimum driving range.

Authority: Sec. 6, Pub. L. 100-494, 100 Stat. 2448 (15 U.S.C. 2013); delegation of authority at 49 CFR 1.50.

##### § 538.1 Scope.

This part establishes minimum driving range criteria to aid in identifying passenger automobiles that are either dual energy automobiles or natural gas dual energy automobiles. It also establishes procedures by which manufacturers may petition for a lower driving range for a specific model of natural gas dual energy automobile and by which the agency may grant or deny such petitions.

**§ 538.2 Purpose.**

The purpose of this part is to specify one of the criteria in section 513(h) of the Act for identifying dual energy and natural gas dual energy passenger automobiles that are manufactured in model years 1993 through 2004. The fuel economy of these passenger automobiles is calculated in a special manner so as to facilitate the compliance of their manufacturers with the Corporate Average Fuel Economy Standards set forth in part 531 of this title and thereby encourage the production of such vehicles.

**§ 538.3 Applicability.**

This part applies to manufacturers of passenger automobiles that are either dual energy or natural gas dual energy passenger automobiles manufactured during model years 1993–2004.

**§ 538.4 Definitions.**

(a) Statutory terms. (1) The terms "dual energy automobile," "natural gas dual energy automobile," and "alcohol" are used as defined in section 513 of Title V of the Act.

(2) The terms "automobile" and "passenger automobile," are used as defined in section 501 of the Act and in accordance with the determinations in part 523 of this chapter.

(3) The term "manufacturer" is used as defined in section 501 of the Act and in accordance with Part 529 of this chapter.

(4) The term "model year" is used as defined in section 501 of the Act.

(5) As used in this part, unless otherwise required by the context: "Act" means the Motor Vehicle Information and Cost Savings Act (Pub. L. 92-513), as amended.

(b) Other terms. The terms "average fuel economy," "fuel economy," and "model type" are used as defined in Subpart A of 40 CFR part 600.

**§ 538.5 Minimum driving range.**

(a) The minimum driving range which a passenger automobile must have in order to be treated as a dual energy automobile pursuant to section 513(1)(C) of the Act is 200 miles when operating on its full capacity of alcohol fuel.

(b) Except as provided in § 538.7, the minimum driving range which a passenger automobile must have in order to be treated as a natural gas dual energy automobile pursuant to section 513(1)(D) of the Act is 100 miles when operating on its full capacity of natural gas.

(c) The Administrator may determine that a specific model type or types of natural gas dual energy automobiles may have a lower range than that

specified in paragraph (b) of this section and still qualify as a natural gas dual energy automobile for purposes of the section. In making such a determination, the Administrator takes into account the factors specified in § 538.7(f).

**§ 538.6 Measurement of driving range.**

The driving range of a passenger automobile model type is determined by dividing the combined EPA city/highway fuel economy when operating on the alcohol or natural gas fuel by the capacity in gallons, of the fuel tank containing the alcohol or natural gas. The combined EPA city/highway fuel economy is the value determined by the procedures established by the Administrator of the Environmental Protection Agency under section 503(d) of the Act and set forth in 40 CFR part 600.

**§ 538.7 Petitions for reduction of minimum driving range.**

(a) A manufacturer of a model type of passenger automobile capable of operating on both natural gas and either gasoline or diesel fuel may petition for a reduced minimum driving range for that model type in accordance with paragraphs (b) and (c) of this section.

(b) Each petition shall—

(1) Be addressed to: Administrator, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590.

(2) Be submitted not later than the beginning of the first model year in which the petitioner seeks to have the model type treated as a natural gas dual energy automobile.

(3) Be written in the English language.

(4) State the full name, address, and title of the official responsible for preparing the petition, and the name and address of the petitioner.

(5) Set forth in full data, views and arguments of the petitioner, including the information and data specified in § 538.7(b) and the calculations and analyses used to develop that information and data. No documents may be incorporated by reference in a petition unless the documents are submitted with the petition.

(6) Specify and segregate any part of the information and data submitted under this section that the petitioner wishes to have withheld from public disclosure in accordance with part 512 of this chapter.

(c) Each petitioner shall include the following information in its petition.

(1) Identification of the model type or types for which a lower driving range is sought under this section.

(2) For each model type identified in accordance with paragraph (c)(1):

(i) The driving range sought for that model type.

(ii) The number of years for which that driving range is sought.

(iii) A description of the model type, including car line designation, engine displacement and type, natural gas fuel tank location and capacities, transmission type and average fuel economy when operating on (1) natural gas, and (2) on gasoline or diesel fuel.

(iv) An explanation of why the petitioner cannot modify the model type so as to meet the generally applicable minimum range, including the steps taken by the petitioner to improve the minimum range of the vehicle, as well as additional steps that are technologically feasible, but have not been taken. The costs to the petitioner of taking these additional steps shall be included.

(3) A discussion of why granting the petition would be consistent with the following factors:

(i) The purposes of the Alternative Motor Fuels Act, including encouraging the development and widespread use of natural gas as a transportation fuel by consumers, and the production of passenger automobiles capable of being operated on both natural gas and gasoline/diesel fuel;

(ii) Consumer acceptability;

(iii) Economic practicability;

(iv) Technology;

(v) Environmental impact;

(vi) Safety;

(vii) Driveability; and

(viii) Performance.

(d) If a petition is found not to contain the information required by this section, the petitioner is informed about the areas of insufficiency and advised that the petition will not receive further consideration until the required information is received.

(e) The Administrator may request the petitioner to provide information in addition to that required by this section.

(f) The Administrator publishes in the Federal Register a notice of receipt for each petition containing the information required by this section. Any interested person may submit written comments regarding the petition.

(g) In reaching a determination on a petition submitted under this section, the Administrator takes into account:

(1) The purposes of the Alternative Motor Fuels Act, including encouraging the development and widespread use of methanol, ethanol and natural gas as transportation fuels by consumers, and the production of alternative fuel powered motor vehicles;

(2) Consumer acceptability;

(3) Economic practicability;

(4) Technology;

- (5) Environmental impact;
- (6) Safety;
- (7) Driveability; and
- (8) Performance.

(h) If the Administrator grants the petition, the petitioner is notified in writing, specifying the model years for

which it applies. He also publishes in the **Federal Register** a notice of the grant and the reasons for it.

(i) If the Administrator denies the petition, the petitioner is notified in writing. He also publishes in the **Federal**

**Register** a notice of the denial and the reasons for it.

Issued on February 12, 1990.

**Barry Felrice,**

*Associate Administrator for Rulemaking.*  
[FR Doc. 90-3656 Filed 2-15-90; 8:45 am]

BILLING CODE 4910-59-M

## Notices

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

### DEPARTMENT OF AGRICULTURE

#### Human Nutrition Board of Scientific Counselors; Board Meeting

According to the Federal Advisory Committee Act of October 6, 1972 (Pub. L. 92-463, 86 Stat. 770-776), the Office of the Secretary announces the following meeting:

**Name:** Human Nutrition Board of Scientific Counselors.

**Date:** February 22-23, 1990.

**Time and Place:** February 22, 1990, 9 a.m.-5 p.m. and February 23, 1990, 8:30 a.m.-1 p.m.; Room 104-A, Administration Building, United States Department of Agriculture, Independence Avenue, between 12th and 14th Streets SW., Washington, DC.

**Type of Meeting:** Open to the public.

Persons may participate in the meeting as time and space permit.

**Comments:** The public may file written comments before or after the meeting with the contact person below.

**Purpose:** To review as appropriate and advise the Department as to the scope and quality of the human nutrition research and education programs carried out in the Department of Agriculture. The board also will prepare a report of its review, including evaluation and recommendations, to be submitted to the Secretary of Agriculture.

**Contact Person:** Gerald F. Combs, Assistant Deputy Administrator for Human Nutrition, Agricultural Research Service, U.S. Department of Agriculture, Room 32, Building 005, Beltsville Agricultural Research Center-West, Beltsville, Maryland 20705, telephone (301) 344-3216.

Done at Washington, DC, this 8th day of February 1990.

Charles E. Hess,

Assistant Secretary, Science and Education.  
[FR Doc. 90-3771 Filed 2-15-90; 8:45 am]

BILLING CODE 3410-01-M

### DEPARTMENT OF COMMERCE

#### International Trade Administration

#### Initiation of Antidumping and Countervailing Duty Administrative Reviews

**AGENCY:** International Trade Administration/Import Administration, Department of Commerce.

**ACTION:** Notice of initiation of antidumping and countervailing duty administrative reviews.

**SUMMARY:** The Department of Commerce has received requests to conduct administrative reviews of various antidumping and countervailing duty orders and findings. In accordance with the Commerce Regulations, we are initiating those administrative reviews.

**EFFECTIVE DATE:** February 16, 1990.

**FOR FURTHER INFORMATION CONTACT:** Richard W. Moreland or Holly A. Kuga, Office of Antidumping Compliance or Office of Countervailing Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC. 20230; telephone (202) 377-2104/2786.

#### SUPPLEMENTARY INFORMATION:

##### Background

The Department of Commerce ("the Department") has received timely requests, in accordance with sections 353.22 (a)(1), (a)(2), (a)(3), and 355.22 (a)(1) of the Department's regulations, for administrative reviews of various antidumping and countervailing duty orders and findings.

##### Initiation of Reviews

In accordance with sections 353.22(c) and 355.22(c) of the department's regulations, we are initiating administrative reviews of the following antidumping and countervailing duty orders and findings. We intend to issue the final results of these reviews no later than December 31, 1990.

### Federal Register

Vol. 55, No. 33

Friday, February 16, 1990

Antidumping duty proceedings and firms	Periods to be reviewed
Canada: Elemental Sulphur ..... A-122-047 BP Resources Canada Ltd. InterRedec Sulphur Corp. Sulco Chemical Ltd. Petro Canada	12/1/88-11/30/89
Japan: Cellular Mobile Telephones and Subassemblies A-588-405 ..... Mitsubishi Electric Co.	12/1/88-11/30/89
Mexico: Porcelain-on-Steel Cookware ..... A-201-504 Troqueles Y Esmaltes CINSA, S.A.	12/1/88-11/30/89
New Zealand: Low-Fuming Brazing Copper Wire & Rod ..... A-614-502 McKechnie Brothers	12/1/88-11/30/89
Sweden: Seamless Stainless Steel Hollow Products ..... A-401-603 Sandvik AB, AB Sandvik Steel, and Sandvik Steel Co.	12/1/88-11/30/89
Taiwan: Carbon Steel Butt-Weld Pipe Fittings A-583-605 Rigid Industries CM Pipe Fitting Co.	12/1/88-11/30/89
<i>Countervailing Duty Proceedings</i> Mexico: Porcelain-on-Steel Cookware C-201-505	1/1/89-12/31/89

Interested parties must submit applications for administrative protective orders in accordance with section 353.34(b) or 355.34(b) of the Department's regulations.

These initiations and this notice are in accordance with section 751(a) of the Tariff Act of 1930 (19 U.S.C. 1675(a)) and 19 CFR 353.22(c) (1989) and 355.22(c) (1988).

Dated: February 9, 1990.

Joseph A. Spetrini,

Deputy Assistant Secretary for Compliance.

[FR Doc. 90-3681 Filed 2-15-90; 8:45 am]

BILLING CODE 3510-DS-M

[A-588-704]

**Brass Sheet and Strip from Japan; Termination of Antidumping Duty Administrative Review**

**AGENCY:** International Trade Administration/Import Administration, Department of Commerce.

**ACTION:** Notice of Termination of Antidumping Duty Administrative Review.

**SUMMARY:** On September 20, 1989, the Department of Commerce initiated an administrative review of the antidumping duty order on brass sheet and strip from Japan. The Department has now determined to terminate this review.

**EFFECTIVE DATE:** February 16, 1990.

**FOR FURTHER INFORMATION CONTACT:**

Joseph A. Fargo or Laurie A. Lucksinger, Office of Antidumping Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230, telephone: (202) 377-5253.

**SUPPLEMENTARY INFORMATION:**

**Background**

On September 20, 1989, in response to a request received from a respondent in this case, the Department of Commerce published a notice of initiation of administrative review of the antidumping duty order on brass sheet and strip from Japan (54 FR 38712). This notice stated that we would review entries from Yoshida Kogyo KK during the period February 1, 1988 through July 31, 1989.

The respondent subsequently withdrew its request for review on December 19, 1989. Accordingly, the Department has determined to terminate the review.

This notice is in accordance with section 751(a)(1) of the Tariff Act of 1930 (19 U.S.C. 1675(a)) and 19 CFR 353.22(a)(5) (1989).

Dated: February 9, 1990.

**Eric I. Garfinkel,**

Assistant Secretary for Import Administration

[FR Doc. 90-3683 Filed 2-15-90; 8:45 am]

BILLING CODE 3510-DS-M

[A-582-802, A-589-806, A-583-808]

**Postponement of Preliminary Antidumping Duty Determinations Sweaters Wholly or in Chief Weight of Man-Made Fiber From Hong Kong, the Republic of Korea, and Taiwan**

**AGENCY:** Import Administration,

International Trade Administration, Commerce.

**ACTION:** Notice.

**SUMMARY:** This notice informs the public that we have received a request from the petitioner in these investigations to postpone the preliminary determinations, as permitted in section 733(c)(1)(A) of the Tariff Act of 1930, as amended (the Act), (19 U.S.C. 1673b(c)(1)(A)). Based on this request, we are postponing our preliminary determinations as to whether sales of sweaters wholly or in chief weight of man-made fiber from Hong Kong, the Republic of Korea, and Taiwan have occurred at less than fair value until not later than April 6, 1990.

**EFFECTIVE DATE:** February 16, 1990.

**FOR FURTHER INFORMATION CONTACT:**

Mary Clapp, Kate Johnson, or Carole Showers, at (202) 377-3965, 377-8830, or 377-3217, Office of Antidumping Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce 14th Street and Constitution Avenue NW., Washington, DC 20230.

**SUPPLEMENTARY INFORMATION:** On October 19, 1989, the Department initiated antidumping duty investigations of sweaters wholly or in chief weight of man-made fiber from Hong Kong, the Republic of Korea, and Taiwan. The notice stated that we would issue our preliminary determinations on or before March 1, 1990 (54 FR 42972-42974, October 19, 1989).

On February 2, 1990, counsel for petitioner requested that the Department postpone the preliminary determinations until April 6, 1990, pursuant to 19 U.S.C. 1673(c). Accordingly, we are postponing the date of the preliminary determinations until not later than April 6, 1990. The U.S. International Trade Commission is being advised of this postponement in accordance with section 733(f) of the Act.

This notice is published pursuant to section 733(c)(2) of the Act.

Dated: February 8, 1990.

**Eric I. Garfinkel,**

Assistant Secretary for Import Administration

[FR Doc. 90-3682 Filed 2-15-90; 8:45 am]

BILLING CODE 3510-DDS-M

[C-201-405]

**Certain Textile Mill Products from Mexico; Final Results of Changed Circumstances Countervailing Duty Administrative Review and Revocation of Countervailing Duty Order (in Part)**

**AGENCY:** International Trade Administration/Import Administration, Department of Commerce.

**ACTION:** Notice of Final Results of Changed Circumstances Countervailing Duty Administrative Review and Revocation of Countervailing Duty Order (in Part).

**SUMMARY:** On December 27, 1989, the Department of Commerce published the preliminary results of its changed circumstances administrative review and intent to revoke (in part) the countervailing duty order on certain textile mill products from Mexico. We have now completed that review and determine to revoke the countervailing duty order with respect to duty-free textile mill products from Mexico effective August 24, 1986.

**EFFECTIVE DATES:** February 16, 1990.

**FOR FURTHER INFORMATION CONTACT:** Jean C. Kemp or Paul McGarr, Office of Countervailing Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-2786.

**SUPPLEMENTARY INFORMATION:** Background

On December 27, 1989, the Department of Commerce ("the Department") published in the *Federal Register* (54 FR 53164) the preliminary results of its changed circumstances administrative review and intent to revoke (in part) the countervailing duty order on certain textile mill products from Mexico (50 FR 10824; March 18, 1985). The Department has now completed that review in accordance with section 751 of the Tariff Act of 1930 ("the Tariff Act").

**Scope of Review**

Imports covered by this review are duty-free textile mill products from Mexico. This duty-free merchandise was classifiable during 1986 under the following item numbers of the *Tariff Schedules of the United States Annotated* ("TSUSA"): 319.0300, 319.0700, 339.1000, 355.8100, 356.2510, 358.0690, 358.1400, 360.7900, 360.8400, 364.0500, 364.1800 and 364.2500. This merchandise was classifiable under the same TSUSA item numbers during 1987 and 1988, with the exception of merchandise classifiable under 364.2500

which became classifiable under 364.2505 and 364.2510. Duty-free textile mill products from Mexico subject to the countervailing duty order are currently classifiable under the following item numbers of the *Harmonized Tariff Schedule*: 3703.10.60, 3918.10.31, 3921.12.11, 3921.13.11, 3921.90.11, 3926.90.58, 3926.90.57, 4010.91.11, 4010.91.15, 4010.99.11, 4010.99.15, 5110.00.00, 5113.00.00, 5208.31.20, 5208.32.10, 5208.41.20, 5208.42.10, 5208.51.20, 5208.52.10, 5209.31.30, 5209.41.30, 5209.51.30, 5308.30.00, 5311.00.60, 5703.90.00, 5805.00.10, 5809.00.00, 5903.10.20, 5903.20.20, 5903.90.20, 5906.91.20, 5906.99.20, 5910.00.10, 5911.40.00, 6302.99.10, 6304.99.10, 6304.99.40, 6307.90.90, 9505.10.25, 9505.10.50, and 9505.90.06.

#### Analysis of Comments Received

We gave interested parties an opportunity to comment on the preliminary results and intent to revoke. We received no comments.

#### Final Results of Review and Revocation (in Part)

As a result of our changed circumstances administrative review, we are revoking the countervailing duty order with respect to duty-free textile mill products from Mexico. The effective date of the revocation is August 24, 1986.

On September 5, 1989, the Department published in the *Federal Register* (54 FR 36841) the final results of its administrative review of the countervailing duty order on certain textile mill products from Mexico covering the 1986 review period. We instructed the Customs Service to continue to suspend liquidation on all unliquidated shipments of the duty-free Mexican textile mill products entered, or withdrawn from warehouse, for consumption on or after August 24, 1986. The Department will now instruct the Customs Service to terminate the suspension of liquidation requirement and refund any cash deposits of estimated countervailing duties made on any shipments of this duty-free merchandise entered, or withdrawn from warehouse, for consumption on or after August 24, 1986.

This change circumstances administrative review, revocation and notice are in accordance with sections 751 (b) and (c) of the Tariff Act (19 U.S.C. 1675 (b) and (c)) and 19 CFR 355.22 and 355.25.

Dated: February 9, 1990.  
Eric I. Garfinkel,  
*Assistant Secretary for Import Administration*  
[FR Doc. 90-3684 Filed 2-5-90; 8:45 am]  
BILLING CODE 3510-DS-M

[A-588-810]

#### Antidumping Duty Order: Mechanical Transfer Presses from Japan

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Notice.

**SUMMARY:** In its investigation, the U.S. Department of Commerce determined that mechanical transfer presses (MTPs) from Japan were being sold in the United States at less than fair value. In a separate investigation, the U.S. International Trade Commission (ITC) determined that a U.S. industry is being materially injured by reason of imports of MTPs from Japan.

Therefore, based on these findings, all unliquidated entries or warehouse withdrawals of MTPs for consumption from Japan made on or after August 18, 1989, the date on which the Department published its preliminary determination in the *Federal Register* (54 FR 31980), will be liable for the possible assessment of antidumping duties. Further, a cash deposit of estimated antidumping duties must be made on all such entries, and withdrawals from warehouse, for consumption made on or after the date of publication of this antidumping duty order in the *Federal Register*.

**EFFECTIVE DATE:** February 16, 1990.

**FOR FURTHER INFORMATION CONTACT:** James P. Maeder, Jr. or V. Irene Darzenta, Office of Antidumping Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 377-4929 or 377-0186, respectively.

**SUPPLEMENTARY INFORMATION:** We note that ambiguity existed in the scope language previously published in the Notice of Initiation (54 FR 5993, February 7, 1989) and Notice of Preliminary Determination (54 FR 31980, August 18, 1989) with regard to the definition of MTPs. Therefore, in our final determination, we clarified the language describing the MTPs under investigation.

The products covered by this investigation are mechanical transfer presses which refer to automatic metal-forming machine tools from station to

station in which the workpiece is moved from station to station by a transfer mechanism designed as an integral part of the press and synchronized with the press action, whether imported as machines or parts suitable for use solely or principally with these machines. These presses may be assembled or unassembled. Until July 1, 1989, this merchandise was classifiable under Harmonized Tariff Schedule item numbers 8462.29.00, 8462.39.00, 8462.49.00, 8462.99.00, and 8466.94.50. Effective July 1, 1989, the Committee for Statistical Annotation of the Tariff Schedules changed the tariff classification of mechanical transfer presses. Mechanical transfer presses are currently classifiable under HTS item numbers 8462.99.0035 and 8466.94.5040.

In accordance with section 735(a) of the Tariff Act of 1930, as amended (19 U.S.C. 1673d(a)) (the Act), on December 26, 1989, the Department made its final determination that MTPs from Japan are being sold at less than fair value (55 FR 335, January 4, 1990). On February 8, 1990, in accordance with section 735(d) of the Act, the ITC notified the Department that such imports materially injure a U.S. industry.

Therefore, in accordance with sections 736 and 751 of the Act, the Department will direct U.S. Customs officers to assess, upon further advice by the administering authority pursuant to section 736(a)(1) of the Act, antidumping duties equal to the amount by which the foreign market value of the merchandise exceeds the United States price for all entries of MTPs from Japan. These antidumping duties will be assessed on all unliquidated entries of MTPs from Japan entered, or withdrawn from warehouse, for consumption on or after August 18, 1989, the date on which the Department published its preliminary determination notice in the *Federal Register*.

On or after the date of publication of this notice in the *Federal Register*, U.S. Customs officers must require, at the same time as importers would normally deposit estimated duties on this merchandise, a cash deposit equal to the estimated weighted-average dumping margins as noted below: Department of Commerce

Manufacturers/producers/exporters	Margin percentage
Komatsu Ltd.	15.16
Aida Engineering, Ltd.	7.49
All others	14.51

This constitutes the antidumping duty order with respect to MTPs from Japan,

pursuant to section 736(a) of the Act. Interested parties may contact the Central Records Unit, Room B-099 of the Maine Commerce Building, for copies of an updated list of antidumping duty orders currently in effect.

This order is published in accordance with section 736(a) of the Act and § 353.21 of the Commerce Regulations (19 CFR 353.21).

Dated: February 13, 1990.

**Eric I. Garfinkel,**  
Assistant Secretary for Import Administration.

[FR Doc. 90-3794 Filed 2-15-90; 8:45 am]

BILLING CODE 3510-DS-M

[C-201-006]

#### Polypropylene Film From Mexico; Termination of Suspended Countervailing Duty Investigation

**AGENCY:** International Trade Administration/Import Administration, Department of Commerce.

**ACTION:** Notice of termination of suspended countervailing duty investigation.

**SUMMARY:** The Department of Commerce is terminating the suspended countervailing duty investigation on polypropylene film from Mexico because it is no longer of interest to interested parties.

**EFFECTIVE DATE:** January 1, 1989.

**FOR FURTHER INFORMATION CONTACT:** Millie Mack or Barbara Williams, Office of Agreements Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-3793.

#### SUPPLEMENTARY INFORMATION:

##### Background

On December 7, 1989, the Department of Commerce ("the Department") published in the Federal Register (54 FR 50523) its intent to terminate the suspended countervailing duty investigation on polypropylene film from Mexico (47 FR 54992; December 7, 1982). Interested parties who objected to the termination were provided the opportunity to submit their comments on or before December 31, 1989.

Additionally, as required by section 355.25(d) (4) (ii) of the Department's regulations, the Department served written notice of its intent to terminate this suspended investigation on each interested party listed on the service list. On December 21, 1989, the Department published a notice of opportunity to request administrative review in this proceeding (54 FR 52436) for the period

January 1, 1988 through December 31, 1988.

#### Scope of Suspended Investigation

The United States, under the auspices of the Customs Cooperation Council, has developed a system of tariff classification based on the international harmonized system of customs nomenclature. On January 1, 1989, the United States fully converted to the Harmonized Tariff Schedule ("HTS"), as provided for in section 1201 *et seq.* of the Omnibus Trade and Competitiveness Act of 1988. All merchandise entered, or withdrawn from warehouse, for consumption on or after that date is now classified solely according to the appropriate HTS item number(s). The suspension agreement is applicable to all polypropylene film manufactured by Celulosa Y Derivados and directly or indirectly exported to the United States. Imports covered by this suspended investigation are shipments of Mexican polypropylene film, a thin transparent film made from polypropylene resin. Polypropylene film is used for packaging a wide variety of articles and in the manufacture of pressure sensitive packaging tape, dielectric material in electrical capacitors and for wrapping power and communication cables. Through 1988, such merchandise was classifiable under item numbers 774.5595 and 771.4316 of the Tariff Schedules of the United States Annotated. This merchandise is currently classifiable under HTS item number 3920.20.0000. The HTS item number is provided for convenience and Customs purposes. The written description remains dispositive.

#### Determination to Terminate

The Department may terminate a suspended investigation if the Secretary of Commerce concludes that a suspended investigation is no longer of interest to interested parties. We received no objections to our intent to terminate the suspended investigation on polypropylene film from Mexico and have not received a request to conduct an administrative review of the suspended investigation for more than four consecutive anniversary months.

Based on the absence of both objections to the termination of this suspended investigation and requests for administrative reviews by interested parties, the Department has concluded that the suspended investigation is no longer of interest to interested parties. Therefore, we are terminating the suspended countervailing duty investigation on polypropylene film from Mexico in accordance with section 355.25(d) (4) of the Department's

regulations. The effective date of this termination is January 1, 1989.

This notice is in accordance with 19 CFR 355.25(d) (3) (vii) and 355.25(d) (5).

Dated: February 9, 1990.

**Eric I. Garfinkel,**

Assistant Secretary for Import Administration.

[FR Doc. 90-3679 Filed 2-15-90; 8:45 am]

BILLING CODE 3510-DS-M

[C-201-012]

#### Carbon Black From Mexico; Amendment to Final Results of Countervailing Duty Administrative Review in Accordance with Decision upon Remand

**AGENCY:** International Trade Administration/Import Administration, Department of Commerce.

**ACTION:** Notice of amendment to final results of countervailing duty administrative review in accordance with decision upon remand.

**SUMMARY:** The Court of International Trade has upheld remand results submitted by the Department of Commerce on November 21, 1988. The remand involved the final results of the administrative review of the countervailing duty order on carbon black from Mexico for the period April 8, 1983 through September 30, 1983. As a result of the remand decision, the Department has determined the total bounty or grant to be 3.30 percent *ad valorem*.

**EFFECTIVE DATE:** March 16, 1990.

**FOR FURTHER INFORMATION CONTACT:** David Layton or Paul McGarr, Office of Countervailing Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-2786.

#### SUPPLEMENTARY INFORMATION:

##### Background

On August 26, 1986, the Department of Commerce ("the Department") published in the Federal Register (51 FR 13269) the final results of its administrative review of the countervailing duty order on carbon black from Mexico. The review covered the period April 8, 1983 through September 30, 1983. The results of that review were challenged in the Court of International Trade ("CIT") by the petitioner, Cabot Corporation. Pursuant to a court order, the Department instructed the U.S. Customs Service on September 9, 1986 to suspend liquidation of entries of the subject merchandise pending final judgment of the CIT.

On July 21, 1988, the CIT in *Cabot Corporation v. United States*, Court No. 86-09-01109 [CIT 1988], remanded the final results of review to the Department for redetermination. On November 21, 1988, we submitted the final results of the remand to the CIT which were affirmed on June 7, 1989.

#### Remand Results

Pursuant to the remand, the Department recalculated the net FOMEX and FONEI benefits received by the Mexican respondents for those loans for which effective interest rates had not been correctly applied in the final results.

#### (1) Fomex

The Department recalculated the benefits of dollar-denominated FOMEX export loans granted during the review period. We have continued to use as our commercial benchmark a weighted-average rate derived from the quarterly weighted-average effective interest rates published in the *Federal Reserve Bulletin*. In the final results, the Department mistakenly considered these Federal Reserve rates to be nominal rates. Consequently, we compared our benchmark to the nominal rates on export loans. Since we have now established that the Federal Reserve rates we used to calculate our benchmark were, in fact, effective rates, we have compared this benchmark to the effective interest rates on the FOMEX export loans and recalculated the benefit from FOMEX export loans granted during the review period. On this basis, we determine the benefit from FOMEX export loans to be 0.50 percent *ad valorem* for all companies.

#### (2) Fonei

We recalculated the benefit from one peso-denominated long term variable-rate FONEI loan using an effective rate benchmark. We treated this loan as a series of short-term loans. To determine the effective interest rate benchmark for this loan, we calculated an average 1983 effective rate from data reported by the Banco de Mexico in its monthly publication, *Indicadores Economicos* (I.E.) in place of the average nominal I.E. rate previously applied.

As a result, the benefit from this FONEI loan yields a weight-average benefit of 0.15 percent *ad valorem* for all companies. The total benefit from the FONEI program during the review period is 0.16 percent *ad valorem* for all companies.

#### Amended Final Results

As a result of the remand decision, we are amending the final results of review

to incorporate the results set forth above. Accordingly, we determine the total bounty or grant during the period April 8, 1983 through September 30, 1983 to be 3.30 percent *ad valorem*.

The Department will instruct the Customs Service to assess countervailing duties of 3.30 percent of the f.o.b. invoice price on all shipments of the subject merchandise exported on or after April 8, 1983 and on or before September 30, 1983.

Dated: February 9, 1990.

Eric I. Garfinkel,  
Assistant Secretary for Import  
Administration.

[FR Doc. 90-3680 Filed 2-15-90; 8:45 am]  
BILLING CODE 3510-DS-M

#### National Institute of Standards and Technology

##### Visiting Committee on Advanced Technology; Meeting

**AGENCY:** National Institute of Standards and Technology, DoC.

**ACTION:** Notice of public meeting.

**SUMMARY:** Pursuant to the Federal Advisory Committee Act, 5 U.S.C. App., notice is hereby given that the National Institute of Standards and Technology Visiting Committee on Advanced Technology will meet on Monday, March 5, 1990, from 1 p.m. to 5 p.m. The Visiting Committee on Advanced Technology is composed of nine members appointed by the Director of the National Institute of Standards and Technology who are eminent in such fields as business, research, new product development, engineering, labor, education, management consulting, environment, and international relations. The purpose of this meeting is to provide advice to the Department of Commerce on the Advanced Technology Program, pursuant to title 5, section 5131(a) of the Omnibus Trade and Competitiveness Act.

**DATES:** The meeting will convene March 5, 1990, at 1 p.m. and adjourn at 5 p.m. on March 5, 1990.

**ADDRESSES:** The meeting will be held at the Department of Commerce, Herbert C. Hoover Building, 14th and Constitution Avenue, Washington, DC in room 4830.

**FOR FURTHER INFORMATION CONTACT:** Dr. Dale E. Hall, Executive Director, Visiting Committee on Advanced Technology, National Institute of Standards and Technology, Gaithersburg, Maryland 20899, telephone number (301) 975-2158.

Dated: February 12, 1990.

John W Lyons,  
Director.

[FR Doc. 90-3703 Filed 2-15-90; 8:45 am]  
BILLING CODE 3510-13-M

#### National Oceanic and Atmospheric Administration

##### National Marine Fisheries Service; Permit Modification; Dr. Daniel P. Costa, Mr. John M. Francis, and Ms. Carolyn B. Heath (P277E)

##### Modification No. 3 to Permit No. 422

Notice is hereby given that pursuant to the provisions of § 216.33(d) and (e) of the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216), Scientific Research Permit No. 422 issued to Dr. Daniel P. Costa, Mr. John M. Francis and Ms. Carolyn B. Heath, Center for Coastal Marine Studies, University of California at Santa Cruz, Santa Cruz, California 95064 on June 22, 1983 (48 FR 29936), as modified on May 28, 1986 (51 FR 20685) and November 4, 1987 (52 FR 42331) is further modified to extend the period of authorized taking for one year.

Section B.7 is deleted and replaced by:

"7. This permit is valid with respect to the taking of authorized herein until December 31, 1990.

This Modification became effective on January 1, 1990.

Documents submitted in connection with the above application are available for review by appointment in the following offices:

Office of Protected Resources and Habitat Programs, National Marine Fisheries Service, 1335 East-West Highway, Room 7324, Silver Spring, Maryland 20910 (301/427-2289);

Director, Southwest Region, National Marine Fisheries Service, 300 South Ferry Street, Terminal Island, California 90731 (213/514-6196).

Dated: February 12, 1990.

Nancy Foster,

Director, Office of Protected Resources and Habitat Programs, National Marine Fisheries Service.

[FR Doc. 90-3648 Filed 2-15-90; 8:45 am]

BILLING CODE 3510-22-M

#### Endangered Marine Mammals; Application for Permit: Mats Amundin (P460)

Notice is hereby given that an Applicant has applied in due form for a Permit to take marine mammals as authorized by the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361-

1407], the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216), the Endangered Species Act of 1973 (16 U.S.C. 1531-1544), and the regulations governing endangered fish and wildlife permits (50 CFR parts 217-222).

**1. Applicant:** Mats Amundin, Zoologist, Kolmården Zoo, 618 00 Kolmården, Sweden

**2. Type of Permit:** Scientific research under MMPA and scientific purposes under ESA.

**3. Type of Take:** The applicant requests authorization to obtain specimen materials from a stranded baby sperm whale, (*Physeter catodon*) and export that material to Sweden for research purposes. The anatomy of the sperm whale head will be studied to reveal the sound production mechanism of toothed whales.

**4. Location of and Duration of Activity:** Exportation from Florida to Sweden. 2 years.

Concurrent with the publication of this notice in the *Federal Register*, the Secretary of Commerce is forwarding copies of this application to the Marine Mammal Commission and the Committee of Scientific Advisors.

Written data or views, or requests for a public hearing on this application would be submitted to the Assistant Administrator for Fisheries, National Marine Fisheries Service, U.S. Department of Commerce, 1335 East West Highway, Silver Spring, Maryland 20910, within 30 days of the publication of this notice. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular application would be appropriate. The holding of such hearing is at the discretion of the Assistant Administrator for Fisheries.

All statements and opinions contained in this application are summaries of those of the Applicant and do not necessarily reflect the views of the National Marine Fisheries Service.

Documents submitted in connection with the above application are available for review by appointment in the following offices:

Office of Protected Resources, National Marine Fisheries Service, 1335 East West Highway, Room 7324, Silver Spring, Maryland 20910 (301/427-2289); and Director, Southeast Region, National Marine Fisheries Service, 9450 Koger Blvd., St. Petersburg, Florida 33702 (813/893-3141).

Dated: February 12, 1990.

**Nancy Foster,**  
Director, Office of Protected Resources and Habitat Programs, National Marine Fisheries Service.

[FR Doc. 90-3647 Filed 2-15-90; 8:45 am]

BILLING CODE 3510-22-M

#### Committee for the Implementation of Textile Agreements

#### Announcement of a Request for Bilateral Consultations With the Government of Thailand on Polyester Yarn

February 9, 1990.

**AGENCY:** Committee for the Implementation of Textile Agreements (CITA).

**ACTION:** Notice.

#### FOR FURTHER INFORMATION CONTACT:

Ross Arnold, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377-4212. For information on categories on which consultations have been requested, call (202) 377-3740.

#### SUPPLEMENTARY INFORMATION:

**Authority:** Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

On January 30, 1990, under the terms of Article 3 of the MFA, the Government of the United States requested consultations with the Government of Thailand regarding single spun polyester yarn in Category 604pt., produced or manufactured in Thailand.

The purpose of this notice is to advise the public that, if no solution is agreed upon in consultations with Thailand, the Committee for the Implementation of Textile Agreements may later establish a limit for the entry and withdrawal from warehouse for consumption of single spun polyester yarn in Category 604pt., produced or manufactured in Thailand and imported, regardless of the date of export, during the twelve-month period which began on January 30, 1990 and extends through January 29, 1991, at a level of 375,588 kilograms.

A summary market statement concerning Category 604pt. follows this notice.

Anyone wishing to comment or provide data or information regarding the treatment of Category 604pt., or to comment on domestic production or availability of products included in this category, is invited to submit 10 copies of such comments or information to Augie D. Tantillo, Chairman, Committee for the Implementation of Textile Agreements, U.S. Department of

Commerce, Washington, DC 20230, Attn: Public Comments.

Because the exact timing of the consultations is not yet certain, comments should be submitted promptly. Comments or information submitted in response to this notice will be available for public inspection in the Office of Textiles and Apparel, room H3100, U.S. Department of Commerce, 14th and Constitution Avenue NW., Washington, DC.

Further comment may be invited regarding particular comments or information received from the public which the Committee for the Implementation of Textile Agreements considers appropriate for further consideration.

The solicitation of comments regarding any aspect of the agreement or the implementation thereof is not a waiver in any respect of the exemption contained in 5 U.S.C. 553(a)(1) relating to matters which constitute "a foreign affairs function of the United States."

The United States remains committed to finding a solution concerning Category 604pt. Should such a solution be reached in consultations with the Government of Thailand, further notice will be published in the *Federal Register*.

A description of the textile and apparel categories in terms of HTS numbers is available in the Correlation: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see *Federal Register* notice 54 FR 50797, published on December 11, 1989). Also see 54 FR 49333, published on November 30, 1989.

**Ronald I. Levin,**

*Acting Chairman, Committee for the Implementation of Textile Agreements.*

#### Thailand—Market Statement

**Category 604 Part—Single Spun Polyester Yarn**

January 1990

#### Import Situation and Conclusion

U.S. imports of single spun polyester yarn—category 604 part—from Thailand reached 375,588 kilograms in the first eleven months of 1989, 35 percent above Thailand's calendar year 1988 level of 279,052 kilograms and double Thailand's calendar year 1987 level of 171,458 kilograms. In the January-November 1989 period Thailand became the largest supplier of single spun polyester yarn to the U.S., accounting for 40 percent of total imports. Imports from Thailand accounted for 30 percent of total calendar year 1988 imports.

The sharp and substantial increase of category 604 part imports from Thailand is disrupting the U.S. market for single spun polyester yarn.

**Import Penetration and Market Share**

U.S. production of single spun polyester yarn—Category 604 part—dropped to 3,059,000 kilograms in 1988, 23 percent below the 1987 level and seven percent below the 1986 level. U.S. production continued to decline in 1989, dropping 21 percent in the January–October 1989 compared with the same period in 1988. In contrast, U.S. imports of Category 604 part increased 43 percent between 1986 and 1988. Imports continue to increase in 1989, up seven percent in the first 11 months of 1989 over the January–November 1988 level.

The U.S. producers' share of the single spun polyester yarn market dropped 13 percentage points, falling from 84 percent in 1986 to 71 percent in the January–October 1989 period. During the same period the ratio of imports to domestic production doubled, increasing from 20 percent in 1986 to 41 percent during January–October 1989.

**Duty-Paid Value and U.S. Producers' Price**

Category 604 part imports from Thailand entered under HTS number 5509.21.0000 single spun polyester yarn. These yarns entered the U.S. at a duty-paid landed value below the U.S. producers' price for comparable yarns.

[FR Doc. 90-3674 Filed 2-15-90; 8:45 am]

BILLING CODE 3510-DR-M

**COMMITTEE FOR PURCHASE FROM THE BLIND AND OTHER SEVERELY HANDICAPPED****Procurement List 1990 Additions**

**AGENCY:** Committee for Purchase from the Blind and Other Severely Handicapped.

**ACTION:** Additions to procurement list.

**SUMMARY:** This action adds to Procurement List 1990 commodities to be produced and services to be provided by workshops for the blind or other severely handicapped.

**EFFECTIVE DATE:** March 19, 1990.

**ADDRESSES:** Committee for Purchase from the Blind and Other Severely Handicapped, Crystal Square 5, suite 1107, 1755 Jefferson Davis Highway, Arlington, Virginia 22202-3509.

**FOR FURTHER INFORMATION CONTACT:** Beverly Milkman (703) 557-1145.

**SUPPLEMENTARY INFORMATION:** On August 18, November 13, 27, December 14 and 22, 1989, the Committee for Purchase from the Blind and Other Severely Handicapped published notices (54 FR 34213, 47258, 48789, 51449 and 52841) of proposed additions to Procurement List 1990, which was published on November 3, 1989 (54 FR 46540).

After consideration of the material presented to it concerning capability of qualified workshops to produce the

commodities and provide the services at a fair market price and impact of the addition on the current or most recent contractors, the Committee has determined that the commodities and services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46-48c and 41 CFR 51-2.6.

I certify that the following actions will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

- a. The actions will not result in any additional reporting, recordkeeping or other compliance requirements.
- b. The actions will not have a serious economic impact on any contractors for the commodities and services listed.
- c. The actions will result in authorizing small entities to produce the commodities and provide the services procured by the Government.

Accordingly, the following commodities and services are hereby added to Procurement List 1990:

**Commodities***Diaper, Infant's*

6532-01-127-2213

*Dropcloth, Painter's*

8340-00-068-7908

**Services***Janitorial/Custodial*

Fort Meade, Maryland

*Janitorial/Custodial*

Federal Building and Post Office, Wenatchee, Washington

*Janitorial/Custodial*

Bureau of the Public Debt, 200 Third Street, Parkersburg, West Virginia

Harold G. Fischer,

*Associate Director for Facility Operations.*

[FR Doc. 90-3718 Filed 2-15-90; 8:45 am]

BILLING CODE 6820-33-M

**Procurement List 1990 Proposed Additions**

**AGENCY:** Committee for Purchase from the Blind and Other Severely Handicapped.

**ACTION:** Proposed Additions to Procurement List.

**SUMMARY:** The Committee has received proposals to add to Procurement List 1990 commodities to be produced and a service to be provided by workshops for the blind or other severely handicapped.

**COMMENTS MUST BE RECEIVED ON OR BEFORE:** March 19, 1990.

**ADDRESSES:** Committee for Purchase from the Blind and Other Severely

Handicapped, Crystal Square 5, suite 1107, 1755 Jefferson Davis Highway, Arlington, Virginia 22202-3509.

**FOR FURTHER INFORMATION CONTACT:** Beverly Milkman (703) 557-1145.

**SUPPLEMENTARY INFORMATION:** This notice is published pursuant to 41 U.S.C. 47(a)(2) and 41 CFR 51-2.6. Its purpose is to provide interested persons an opportunity to submit comments on the possible impact of the proposed actions.

If the Committee approves the proposed additions, all entities of the Federal Government will be required to procure the commodities and service listed below from workshops for the blind or other severely handicapped.

It is proposed to add the following commodities and service to Procurement List 1990, which was published on November 3, 1989 (54 FR 46540):

**Commodities***Insulation Tape, Electrical*

5970-00-419-4291

*Table, Office*

7110-00-113-0507

7110-00-113-0509

*Pad, Floor Polishing*

7910-00-985-6800

7910-00-985-6851

7910-00-985-6853

7910-00-985-6855

7910-00-985-6856

7910-00-985-6857

7910-00-985-6858

7910-00-985-6859

7910-00-985-6860

7910-00-985-6861

7910-00-985-6862

7910-00-985-6863

7910-00-985-6864

7910-00-985-6866

7910-00-985-6868

7910-00-985-6869

7910-00-985-6870

7910-00-985-6871

7910-00-985-6872

7910-00-985-6873

7910-00-985-6874

7910-00-985-6875

7910-00-985-6876

*Bag, Plastic*

8105-00-NIB-0011

8105-00-NIB-0012

8105-00-NIB-0013

8105-00-NIB-0014

8105-00-NIB-0015

*Bag, Plastic*

8105-LL-N86-0770

8105-LL-N86-0771

8105-LL-N77-1370

8105-LL-N78-1252

**Service**

*Commissary Shelf Stocking and Custodial  
Fort McPherson, Georgia  
Harold G. Fischer,  
Associate Director for Facility Operations.  
[FR Doc. 90-3719 Filed 2-15-90; 8:45 am]  
BILLING CODE 6820-33-M*

**CONSUMER PRODUCT SAFETY  
COMMISSION****Notification of Request for Extension  
of Approval of Information Collection  
Requirements—Safety Standard for  
Walk-Behind Power Lawn Mowers**

**AGENCY:** Consumer Product Safety  
Commission.

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1981 (44 U.S.C. chapter 35), the Consumer Product Safety Commission has submitted to the Office of Management and Budget a request for extension of approval through January 31, 1993, of information collection requirements in the Safety Standard for Walk-Behind Power Lawn Mowers, 16 CFR part 1205. The standard was issued to eliminate or reduce risks of amputations, avulsions, lacerations, and other serious injuries which have resulted from the accidental contact of some part of an operator's body with the rotating blade of a power lawn mower.

The standard contains performance and labeling requirements for walk-behind power lawn mowers to address risks of blade-contact injuries. The standard also requires manufacturers and importers of mowers subject to its provisions to test mowers for compliance with the performance requirements of the standard and to maintain records of that testing. Additionally, the standard requires manufacturers and importers to label each mower which is subject to the standard with certain information about its production.

The Commission uses the information compiled and maintained by manufacturers and importers of mowers to determine that these firms have complied with the standard. The Commission uses the production information required to appear on the label of each mower to facilitate corrective action in the event mowers which are subject to the standard fail to comply with its requirements in a manner which creates a substantial risk of injury to the public.

**Additional Details About the Requested  
Extension of Approval of Requirements  
for Collection of Information**

**Agency address:** Consumer Product Safety Commission, Washington, DC 20207.

**Title of information collection:** Safety Standard for Walk-Behind Lawn Mowers, 16 CFR part 1205.

**Type of Request:** Extension of approval.

**General description of respondents:** Manufacturers and importers of mowers subject to the standard for walk-behind power lawn mowers.

**Estimated number of respondents:** 40.

**Estimated average number of hours  
for each respondent:** 390 per year.

**Estimated total hours for all  
respondents:** 15,600 per year.

**Comments:** Comments on this requested extension of approval of information collection requirements should be addressed to Donald Arbuckle, Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503; telephone: (202) 395-7340. Copies of the request for extension of information collection requirements are available from Francine Shacter, Office of Planning and Evaluation, Consumer Product Safety Commission, Washington, DC 20207; telephone: (301) 492-6416.

This is not a proposal to which 44 U.S.C. 3504(h) is applicable.

Dated: February 12, 1990.

Sadye E. Dunn,

*Secretary, Consumer Product Safety  
Commission.*

[FR Doc. 90-3709 Filed 2-15-90; 8:45 am]

BILLING CODE 6355-01-M

**COPYRIGHT ROYALTY TRIBUNAL**

[Docket No. CRT 89-2-87CD]

**1987 Cable Royalty Distribution  
Proceeding**

**AGENCY:** Copyright Royalty Tribunal.

**ACTION:** Notice of final determination of Devotional Claimants controversy.

**SUMMARY:** The Copyright Royalty Tribunal announces the adoption of a final determination in the proceeding concerning the distribution to Devotional Claimants of royalty fees paid by cable systems for secondary transmissions during 1987. A final determination of the Music Claimants controversy will be issued at a later date.

**FOR FURTHER INFORMATION CONTACT:**

Robert Cassler, General Counsel,  
Copyright Royalty Tribunal, 1111 20th

Street, NW., Suite 450, Washington, DC 20036 (202-653-5175).

**SUPPLEMENTARY INFORMATION:****Authority**

Section 111(d)(3) of the Copyright Act, as amended August 27, 1986, authorizes the Copyright Royalty Tribunal to distribute annually royalty fees paid by cable systems to those copyright owners whose works were the subject of secondary transmissions by cable systems.

**This Proceeding**

In this proceeding, the Tribunal takes up the distribution of the royalty fees deposited by cable operators for the calendar year 1987. In accordance with past procedures, the Tribunal resolved that the 1987 distribution proceeding would be conducted in two phases. In Phase I, the Tribunal would determine the allocation of cable royalties among various program categories of claimants. The Phase I categories were: Program Suppliers, Sports, Noncommercial Television, U.S. Commercial Television, Music, Devotional Claimants, Canadian Claimants, Noncommercial Radio and Commercial Radio. In Phase II, the Tribunal would allocate cable royalties to individual claimants within a program category.

For this 1987 proceeding, there were no controversies in Phase I. All Phase I parties settled based upon the allocations made by the Tribunal in the 1983 cable distribution proceeding [The 1984-1986 Phase I controversies were similarly settled on the basis of the 1983 allocations.]

In Phase II, there were two controversies. Within the Devotional Claimants category, two parties advanced claims which, when combined, exceeded 100% of the category. One of the parties was the Settling Devotional Claimants (SDC) which includes The Christian Broadcasting Network, Inc. (CBN), Old Time Gospel Hour (OTGH), The Inspirational Network (TIN), Oral Roberts Evangelical Association (OREA), In Touch Ministries, Inc. (ITM), Multimedia Entertainment, Inc. (Multimedia) First Century Broadcasting, Inc. (First Century) and the National Association of Broadcasters (NAB). The other party was Christian Television Corporation (CTC). SDC claimed 100% of the Devotional Claimants category, except for a nominal award to CTC ranging from \$100 to 0.4% of the category. CTC claimed 10% of the category.

Within the Music category, two parties advanced claims which, when

combined, exceeded 100% of the category. The two parties were: American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI). ASCAP claimed 67-72% of the Music category. BMI claimed not less than 50% of the Music category.

The Tribunal heard the two controversies on a staggered schedule, so that the record concerning the Devotional Claimants was developed earlier than for the Music Claimants. Consequently, the Tribunal has decided for the first time to issue its final determination of a cable royalty fund distribution in two parts. This determination concerns only the Devotional Claimants. It is intended to be a final decision of this controversy for purposes of Sections 809 and 810 of the Copyright Act. A final determination of the Music Claimants controversy will be issued at a later date.

#### Background and Chronology

Six hundred and seventy-five (675) individual or joint claims were filed with the Tribunal for the 1987 cable royalty fund. On February 1, 1989, the Tribunal published a notice directing all claimants to inform the Tribunal by March 23, 1989 whether any controversies existed concerning the distribution of the 1987 cable royalty fees. 54 FR 5119.

Based upon the written comments which were submitted, the Tribunal announced on March 30, 1989 that controversies did exist in both Phase I and Phase II of the 1987 cable distribution proceeding, effective April 3, 1989. 54 FR 13101.

On April 14, 1989, the Tribunal received notice that all Phase I controversies had been resolved, and that the parties had agreed to a Phase I allocation of cable royalties on the same basis as the allocations made for the 1983-1986 funds. Concerning Phase II, the Tribunal found that controversies existed in the Program Supplies, the Noncommercial Television, the Music and the Devotional Claimants categories.

On April 24, 1989, the Tribunal adopted the agreed-upon Phase I allocations, and ordered an 80% distribution of the royalties in the Devotional Claimants category, and a 100% distribution of all other Phase I categories. 54 FR 16387.

On September 14, 1989, the Tribunal was advised that OREA, ITM, and First Century had reached a settlement with CBN, OTGH and TIN, thereby reducing the controversies in the Devotional Claimants category to a single

controversy between the Settling Devotional Claimants and CTC.

On September 15, 1989, the Tribunal was informed that all controversies had been settled in the Program Suppliers and the Noncommercial Television category.

Accordingly, the Tribunal revised its hearing schedule to hear two controversies.<sup>1</sup> On September 15, 1989, the Devotional Claimants direct cases took place on October 25 and 26, 1989. Rebuttal cases were filed November 17, 1989.

On November 22, 1989, the Settling Devotional Claimants moved for an additional partial distribution of the funds in the Devotional Claimants category. On November 27, 1989, the Tribunal ordered an additional distribution of 5% of the funds in the category.

On December 4 and 5, 1989, the Tribunal heard the rebuttal cases of the Devotional Claimants whereupon the record was closed. Proposed Findings of Fact and Conclusions of Law were filed by the Devotional Claimants on December 20, 1989. Reply Proposed Findings of Fact and Conclusions of Law were filed January 10, 1990.

#### *Controversy One: The Devotional Claimants*

##### Finding of Fact

*The claimants.* The Settling Devotional Claimants (SDC) are a group of religious programmers who reached confidential agreements among themselves concerning the division of royalties from the Devotional Claimants category. SDC Ex. 1, p. 3; Tr. 18-19. They include:

The Christian Broadcasting Network, Inc. (CBN), producer of "The 700 Club," "Superbook," "Flying House," and "Another Life." "The 700 Club" is a 90-minute daily magazine format program featuring Pat Robertson. It is videotaped each week day before a live studio audience, and features interviews with newsmakers. "Superbook" and "Flying House" are 102 half-hour animated programs for children featuring characters from the Bible. "Another Life" is a 30-minute continuing daily drama, or "soap opera." SDC Ex. 1, pp. 4-5; Tr. 19-20.

The Old Time Gospel Hour (OTGH), producer of the "Old Time Gospel Hour," a weekly 60-minute Sunday service conducted by the Reverend Jerry Falwell at Thomas Road Baptist

Church in Lynchburg, Virginia. SDC Ex. 1, p. 4; Tr. 21.

The Inspirational Network (TIN), successor in interest to the producer of the "PTL Club," also known during 1987 as "The Jim and Tammy Show." The "PTL Club" is a daily one-hour program. SDC Ex. 1, p. 4; Tr. 20.

Oral Roberts Evangelical Association (OREA), producer of "Richard Roberts Live," a daily 60-minute talk/variety show. OREA also produces a weekend 30-minute program called "Expect a Miracle" (formerly known as "Oral Roberts and You") which features Oral Roberts and musical presentations, and ministry-oriented productions. SDC Ex. 1, p. 5; Tr. 20.

In Touch Ministries, Inc. (ITM), producer of "In Touch," a weekend program featuring the church service and speaking of Dr. Charles Stanley at the First Baptist Church of Atlanta. SDC Ex. 1, p. 4; Tr. 20.

First Century Broadcasting, Inc. (First Century), producer of four daily religious talk shows entitled, "California Tonight," "New Mexico Tonight," "New York Tonight," and "Double Image." SDC Ex. 1, p. 5; Tr. 22.

Multimedia Entertainment, Inc. (Multimedia), producer of "Gospel Singing Jubilee," a one-hour musical program hosted by Les Beasley and The Florida Boys. SDC Ex. 1, p. 5.

The National Association of Broadcasters (NAB), representing the claims of broadcast stations that produce and syndicate devotional programming, such as local church services and Christian talk shows. SDC Ex. 1, pp. 3-4, n. 1; Tr. 23.

The other party to this controversy is Christian Television Corporation (CTC). CTC owns and operates WCLF-TV, a Christian television station in Clearwater, Florida. CTC Ex. 1, p. 3. CTC is the producer and distributor of eleven programs. They are: "Joy Junction," a half-hour program of games, contests and Bible quizzes intended for children aged 8 to 12 which takes place in a small town called Joy Junction. CTC Ex. 2, p. 1. "Becky's Barn," a half-hour program designed to teach Bible principles to pre-school age children. *Id.* "Solo Act," a half-hour weekly program targeted to single adults. CTC Ex. 1, p. 10; CTC Ex. 5. "Action Sixties," a one-hour Christian program for senior adults. It airs live each weekday at 10 a.m. and is repeated each evening at 6 p.m. CTC Ex. 1, p. 10; CTC Ex. 12. "Good Night Alive," a live one-hour late-night Christian talk/variety show. CTC Ex. 1, p. 11; CTC Ex. 5. "Celebrate with Jessy Dixon," a half-hour Black/Contemporary Gospel music program.

<sup>1</sup> A background and chronology of the Music controversy will be described in the separate determination concerning Music.

CTC Ex. 5. "Word For the World," a half-hour program hosted by Dr. Ron Cottle offering Greek and Hebrew language interpretations of the Bible. *Id.* "The Miller Brothers," a fifteen minute program featuring fast-paced Gospel music. *Id.* "The Good Life," a one-hour talk/variety program hosted by Christian Television Network President Robert D'Andrea and Molly D'Andrea. It airs live daily at 12:30 p.m. and is repeated nationally in prime time at 9 p.m. *Id.* CTC Ex. 12. "The Downings," a half-hour Southern/Contemporary Gospel music program with interviews. CTC Ex. 5. "This is Your Day," a half-hour weekly Bible teaching on praise and worship hosted by Molly D'Andrea. *Id.*

*SDC's Claim.* The Special Nielsen Study—To demonstrate its entitlement, SDC submitted a portion of the 1987 Special Nielsen Study conducted by the A.C. Nielsen Company. The study measures the hours of distant signal nonnetwork programming which are viewed by cable households. SDC Ex. 1, p. 6. The study is based on data derived from Nielsen Station Index survey conducted during six rating cycles in 1987. Tr. 52, 271-273.

For the 1987 study, the sample of U.S. commercial television stations consisted of all stations which were retransmitted as full-time distant signals by Form 3 cable systems with an average of 80,000 subscribers per accounting period. 119 television broadcast stations qualified for inclusion in the sample. *Id.*; Tr. 74-75. SDC asserted that the 119 stations accounted for 97 percent of the distant signal viewing in 1987. Tr. 46.

The number of viewing hours for each of the claimants were as follows:

Program	Viewing hours
700 Club .....	2,366,118
Old Time Gospel Hour.....	1,387,718
PTL Club.....	566,029
Expect a Miracle.....	197,670
Richard Roberts.....	110,124
In Touch Ministry.....	45,928
Total.....	4,673,587

SDC Ex. 2.

First Century, Multimedia, NAB, and CTC garnered no viewing hours in the Nielsen study. SDC Ex. 2; Tr. 26-27.

On the basis that the Settling Devotional Claimants had 4,673,587 cable household viewing hours in 1987 and CTC had none, SDC argued that CTC should be awarded at most a nominal award from the Tribunal. SDC Ex. 1, pp. 7-9.

Abandonment—SDC also argued that CTC should receive no award because it

has abandoned its copyrights in its eleven programs. SDC Ex. R-15. CTC transmits its signal unscrambled to satellite carriers. Tr. 175-178. CTC is not aware until viewers, station owners or cable operators write to inform them which television stations are transmitting, and which cable systems are retransmitting its programs. *Id.* CTC transmits its programs by satellite to get the widest possible use of its programs as one method of raising funds. Tr. 177. CTC does not inform potential users that they need license agreements. Tr. 178.

CTC alleges all its programs were copyrighted; SDC did not allege CTC's programs lacked the notice of copyright. CTC Ex. 5; SDC Ex. R-15. CTC submitted two letters, one granting a Kentucky station permission in 1987 to rebroadcast CTC's programs, the other granting an Iowa station permission in 1988 to rebroadcast CTC's programs. Ex. RX-5, RX-5A. As a practice, most religious broadcasters do not scramble their signals. TR. 438.

*CTC's claim.* Instances of carriage—Based on the Cable Data Corporation survey of November 9, 1989, CTC's programs were carried on 13 broadcast stations in the first half of 1987 and were transmitted by 35 distant cable systems. In the second half of 1987 CTC's programs were carried on 14 broadcast stations which were retransmitted by 33 distant cable systems. SDC Ex. RX-1.

According to the Cable Data Corporation survey of October 26, 1989, CBN, OTGH and TIN, together, were carried by 3,051 distant cable systems in the first half of 1987, and 3,148 distant cable systems in the second half of 1987. *Id.*

Consequently, in terms of instances of carriage, CTC's relative percentage compared to CBN, OTGH, and TIN, was 1.13% for the first half of 1987, and 1.04% for the second half of 1987.

Subscriber reach—Based on the same Cable Data Corporation survey, the 35 cable systems which retransmitted CTC's programs on a distant signal basis in the first half of 1987 served 414,887 subscribers. The 33 cable systems which retransmitted CTC's programs on a distant signal basis in the second half of 1987 served 444,857 subscribers. *Id.*

In the first half 1987, the 3,051 cable systems which retransmitted either CBN, OTGH and/or TIN served 58,390,355 subscribers. In the second half of 1987, the 3,148 cable systems which retransmitted either CBN, OTGH, and/or TIN served 62,388,774. *Id.*

Consequently, in terms of the potential reach to cable subscribers, CTC's relative percentage compared to CBN, OTGH and TIN, was 0.71% for the

first half of 1987, and 0.71% for the second half of 1987.

Time plus fee generation formula—CTC performed a time plus fee generation analysis based on data supplied by Cable Data Corporation. The method is to take the royalties paid by cable systems for the retransmission of the broadcast stations on which CTC's programs were performed and to multiply that by the percentage of time that CTC's programs occupied the broadcast schedule. CTC Ex. 6. It is based on the assumption that each distant signal carried by a cable operator has equal value. Tr. 117-119, 141-144.

None of CTC's programs were on stations paid for by cable systems at the 3.75% rate. Tr. 120. Of the cable royalties paid for at the basic rate, CTC's formula yielded a result of \$15,311.43 generated by CTC's programs' time on the air. CTC Ex. RX-1.

In rebuttal, SDC presented a similar time plus fee generation analysis of CBN, OTGH and TIN. These three claimants were said to have generated \$1,153,058.28 in basic royalties, and \$320,308.62 in 3.75% royalties. SDC Exs. R-4, p. 2, R-5, R-9.

However, WWOR dropped "The 700 Club" from its programming after September 18, 1987. Thus "The 700 Club" was carried by WWOR for 43.5% of the second half of 1987. Letter of December 6, 1989, filed by SDC. "The 700 Club" is claimed to have generated \$217,606.90 in basic royalties and \$125,923.90 in 3.75% royalties for the second half of 1987. SDC Exs. R-5, R-9. Reducing the fees generating to account for the dropping of "The 700 Club" would yield a result of \$1,030,110.38 in basic royalties and \$249,161.62 in 3.75% royalties for CBN, OTGH and TIN for all of 1987.

CTC's percentage of fees generated compared to CBN, OTGH and TIN after accounting for WWOR's dropping of "The 700 Club" is 1.46% of basic royalties, 0% of 3.75% royalties.

In proposed findings, SDC argued that CTC should be given no credit in the fee generation formula for the fees paid by the Lakeland, Florida cable system for retransmission of WCLF-TV. SDC Proposed Findings, paras. 49-52. In 1984, 1985 and part of 1986, the Lakeland cable system sent WCLF a bill to reimburse the system for the cable copyright royalties arising from the retransmission of WCLF-TV. Tr. 199. In 1987, the cable system again sent a bill, but WCLF did not pay because its agreement to pay was with a preceding owner of the Lakeland cable system. *Id.* In 1988, the cable system dropped WCLF

for its failure to reimburse the cable system. Tr. 199-200. SDC argues that this indicates an unwillingness by the Lakeland system to pay the cable fees, and that the fees generated by that system's carriage of WCLF should be deducted from CTC. SDC Proposed Findings, para. 50. Deducting the Lakeland system would yield a total of \$7,513.68 in fees generated by CTC's programs, or 0.72% of basic royalties of CTC, CBN, OTGH and TIN combined. *Id.*, para. 51.

**Harm**—CIC argued it has incurred harm in the cable distant signal marketplace. CTC Ex. 1, pp. 4, 7-9. CTC transmits its signal unscrambled on satellite carriers. Tr. 177, 362. Some cable systems retransmit CTC's signal without CTC's knowledge. CTC, Ex. 1, p. 8. When CTC is unaware that a cable system is retransmitting CTC's signal, it is not able to promote its programs to the cable subscribers through direct-mail appeals or other types of advertisement. *Id.* CTC has a direct mail return response rate of 10.5%, with an average donation per return of \$10.37. *Id.*

As a practice, religious broadcasters do not scramble their signals, although CBN scrambles its signals during some portions of the day. Tr. 438. In that respect, CTC is in no different position than other religious programmers. Tr. 169, 178.

**Benefit**—CTC argued that it has a greater variety of programs than any of the other claimants. CTC argued that each of the eleven programs targets a different audience, and offer something diverse and unique. CTC Proposed Findings, paras. 29-48.

**Marketplace value**—CTC argued that it has greater marketplace value than the other devotional programmers because in 1987 it did not have to pay any broadcasters to broadcast its programs, while the other devotional claimants' primary method to get broadcast stations to air their works is to pay them. CTC Ex. 1, pp. 5, 13; Tr. 55, 285. SDC stated that the policy of devotional programmers of buying airtime is based on their interest in keeping commercials off their programs. Tr. 292-293.

CTC argued that indications of both benefits and marketplace value were the 2000 letters per month received by CTC from viewers of "Joy Junction." CTC Ex. 2, CTC Supp. Direct Ex. 1.

**Time**—CTC argued that its programs had significant carriage during prime time. Eight of the eleven CTC programs aired a total of 17 times per week in prime time on 16 distant systems. CTC Ex. 1, p. 15; Tr. 206. 15 of the 17

instances were carriage of WCLF, CTC's flagship station. Tr. 207.

**Quality**—CTC cited the high technical quality of its programs and that its "Joy Junction" is a winner of four national silver Angel awards for religious programming. CTC Exs. 2, 9, 10. SDC acknowledged that CTC produces quality programs. Tr. 257. CTC acknowledged that the other claimants in the Devotional category produce quality devotional programs. Tr. 218.

#### Conclusions of Law

*SDC has shown entitlement to 99.2% of the basic fund and 100% of the 3.75% fund within the Devotional Claimants category. CTC has shown entitlement to 0.8% of the basic fund and 0% of the 3.75% fund within the Devotional Claimants category.*

The first question to be considered in this controversy is whether CTC abandoned its copyright in its eleven claimed programs. If that were so, then CTC could not be awarded any cable royalties, because the Tribunal may make awards only to copyright owners.

The doctrine of abandonment is one that necessarily turns on the particular facts of a case. None of the cases cited by SDC were in the context of broadcasting or satellite transmission. However, courts have stated the general test.

Abandonment of copyright must be manifested by some overt act indicative of intent to surrender rights in a copyrighted work and to allow the public to copy it; mere inaction is not sufficient manifestation of such intent. *Rohauer v. Killiam Shows, Inc.*, 379 F. Supp. 723 (S.D.N.Y. 1974), *rev'd on other grounds*, 551 F. 2d 484 (2d Cir. 1974). The presence of a notice is strong evidence of an intent not to abandon. *Bell v. Combined Registry Company*, 397 F. Supp. 1241 (N.D. Ill. 1975), *aff'd on other grounds*, 536 F. 2d 164 (7th Cir. 1975). A proprietor who desires to preserve his legal monopoly must be vigilant in policing distributions of the work. *Id.*

Abandonment, then, is based on intent. It does not operate automatically as forfeiture does when a copyright owner neglects to put notice on his work. It must be found that the creator intended to abandon his work. That intent must be demonstrated by an overt act. The overt act which SDC points to is the transmitting of an unscrambled signal without additional efforts to communicate that a license is needed, or efforts to see who is actually using the works.

We do not see that SDC has met its burden. Transmitting unscrambled signals, apparently, is a common practice. The vigilance in policing one's

works which SDC has cited as a requirement in the context of *Bell v. Combined Registry Company* and other cited cases dealt with whether the copyright owner put the copyright notice on his work, not whether the owner took additional steps. It has not been shown that CTC failed to put its notice of copyright on any of its works. CTC has shown that it does issue licenses. If CTC has been, in some people's view, lax, that does not amount to clear indications of CTC's intent to surrender its rights. The Tribunal concludes for purposes of this distribution that CTC is the copyright owner of its eleven claimed programs.

This is the first time in which there has been a controversy within the Devotional Claimants category. As a result, the task has been to ascertain the best evidence on which to base an allocation of Devotional Claimants category without the benefit of prior Phase II proceedings.<sup>2</sup>

The Tribunal has traditionally looked to the special Nielsen study as its starting off point when it has considered controversies in Phase I and in the Program Suppliers category. Devotional producers and distributors are also program suppliers, and our conclusion continues to hold that the special Nielsen study in this record provided the most relevant evidence, because it included viewership.

In this proceeding, the Nielsen data yields a result of 100% for the Settling Devotional Claimants, and 0% for CTC. Yet, the record clearly shows that CTC's programs had a certain level of distant signal carriage. One of the criticisms that has been consistently lodged against reliance on the Nielsen study is that it is not a complete census. It measures only the broadcast stations with the most distant signal retransmissions. The Tribunal has recognized the validity of this criticism, and while the Tribunal has not asked for a complete census, we have stated, "[T]he Tribunal will give credit, when shown, that a claimant's programs have not been measured at all, or have been significantly undermeasured." 1985 *Cable Royalty Distribution Proceeding*, 54 FR 7132, 7136 (1988).

CTC's programs have not been measured at all. Accordingly, the Tribune must look to other indicia of entitlement to weigh the distant signal

<sup>2</sup> Therefore, no consideration of changed circumstances was appropriate. Accordingly, the Tribunal did not consider testimony presented by CTC purporting to show declines in distant signal carriage of SDC's programs from 1986 to be relevant, and no findings of fact were made on this point.

carriage which CTC has shown did occur in 1987.

CTC has endeavored to distinguish its programs from the programs of SDC in all five of the Tribunal's criteria—harm, benefit, marketplace value, time and quality. For each of these distinctions, CTC has requested a 1% bonus which represents 5% of their 10% claim.

However, the Tribunal can perceive no essential differences between CTC and the other devotional programmers. Concerning harm, the type of harm the Tribunal has given credit for in past proceedings is the harm to the exploitation of one's copyright, not difficulties of a general sort. CTC's distribution is similar to other devotional programmers' in that it charges nothing for the carriage of its programs and it seeks the widest dissemination possible. Therefore, it is not harmed by cable retransmission. It is helped. While CTC might be helped further by the cooperation of cable systems in notifying CTC of their programs being retransmitted, this lack of additional help is not harm as the Tribunal has employed the term.

Concerning benefit, the Tribunal has recognized in Phase I that the devotional programmers add to the diversity that cable operators can offer their subscribers as compared to the other Phase I program types of movies, sports, news, etc. But further subdividing a particular category in Phase II to show more diversity can only be credited if there were a real marketplace response to this subdivision. But CTC's programs have barely penetrated the marketplace when one looks at the instances of retransmission. A mere assertion of diversity is not enough to obtain a credit.

CTC attempts to show marketplace value based on its not having paid to have its programs aired on broadcast stations. Yet the explanation of the other claimants that they pay stations to keep their programs free of commercials has been accepted by the Tribunal in the past. CTC might have gotten some credit had stations paid for its programs, but otherwise, we do not consider that it has shown more marketplace value than the other programmers.

Concerning time, the record shows CTC's prime time positioning is basically confined to its flagship station. Quality, as a factor, is true of the programming of all the claimants.

Consequently, the Tribunal, having decided that there are no features of CTS's programs such as would distinguish them from SDC's programs, turns to the various mathematical indicia in the record. In terms of instances of carriage, CTC's percentage

is 1.13% for the first half of 1987, and 1.04% for the second half of 1987, while CBN, OTGH AND TIN's percentages are 98.87% and 98.96%, respectively. In terms of subscriber reach, CTC's percentages are 0.71% for both halves of 1987, and CBN, OTGH and TIN's percentage is 99.29%.

In terms of time plus fee generation formula, the applicable percentages are CTC—1.46% for basic royalties, 0% for 3.75% royalties; CBN, OTGH TIN—98.54% for basic royalties, 100% for 3.75% royalties.

SDC argued that the time plus fee generation formula should not be adjusted for the dropping of CBN from WWOR'S schedule in September, 1987. SDC reasons that if a station is carried even one day into the second half of a year, the cable systems owes for the entire semiannual pay period. SDC's argument would be true if all of WWOR was dropped by the cable systems, but WWOR continued to be carried. Only CBN dropped, and another program was substituted for it. A time-based formula necessarily takes into account the actual time a program was on the air. In any event, the formula is being offered for its relevance to marketplace value, and to ignore the dropping of CBN would be to defeat the purpose for which the evidence was developed.

SDC also argued that the carriage of CTC's programs by the Lakeland cable system should be eliminated from the fee generation formula, because Lakeland only wanted to retransmit the signal if it were reimbursed for it. Here, SDC's argument is more valid. Since the formula is being offered for its relevance to marketplace value, circumstances showing that the Lakeland system expected reimbursement undercuts the induction of value in the formula. However, rather than eliminating Lakeland system's carriage of CTC's program entirely from the formula, the Tribunal believes a downward adjustment is more appropriate.

What relevance the time plus fee generation formula has in Tribunal proceedings has been argued many times in the past. The Tribunal has clearly rejected it as a mechanistic formula because it distorts marketplace analysis. The formula assigns an equal value to all programming based on time, regardless of popularity and demand, so that a program scheduled at three in the morning is assigned equal value to a prime time program. And it is based on an assumption that the cable operator values all programming equally when, to the contrary, the Tribunal has received convincing evidence that cable operators have strongly different preferences. The Nielsen study, on the

other hand, provides the necessary weighting of the programs—the actual viewing—which makes it the more relevant evidence.

However, the Tribunal has just as consistently stated that time plus fee generation has some relevance and could enter the record as part of the mix of evidence indicating the proper allocation. In Phase II, its use has had more relevance because like programming is being compared and the potential for gross marketplace distortion is less, although never accepted at full value. A time analysis was used in allocating royalties between broadcasters and the music claimants in the Commercial Radio category, 1979 *Cable Royalty Distribution Determination (Remand)*, 49 FR 20048, 20051 (1984), and a time plus fee generator formula entered into the consideration of ACEMLA's claim in the Music Category in the 1985 cable royalty distribution proceeding. 1985 *Cable Royalty Distribution Proceeding*, 54 FR 7132, 7139 (1988).

There, the fee generation formula served to confirmed an assessment of the record which the Tribunal had reached on other grounds. Here, too, the formula complements the other findings as to instances of carriage and subscriber reach. Together, a picture is formed of the actual marketplace in 1987 which is supported equally by all the indicia.

Taking into account all the indicia shown by the claimants—the Nielsen study, the instances of carriage, the subscriber reach and the time plus fee generation formula—the Tribunal has determined that CTC has shown an entitlement to 0.8% of the basic royalties, and SDC has shown entitlement to 99.2%. The record indicates that there was not a single instance of a cable system paying 3.75% rate royalties for retransmission of a station carrying CTC's program. Thus the Tribunal concludes that CTC has demonstrated no entitlement to any of the 3.75% royalties.

In reaching this conclusion, the Tribunal took into consideration that the mathematical indicia of instances of carriage, subscriber reach and time plus fee generation formula only accounted for three of SDC's claimants—CBN, OTGH and TIN. Some adjustment was made for the fact that the other SDC claimants would have improved SDC's percentages had their figures been included.

#### Allocation

Within the Devotional Claimants category, the Tribunal has made the

following allocation of the 1987 cable copyright royalty fund:

Basic:	
SDC .....	99.2%
CTC .....	0.8%
3.75%:	
SDC .....	100%
CTC .....	0%

Commissioner Cindy S. Daub did not participate in the determination of this controversy.

Dated: February 9, 1990.

J.C. Argetsinger,  
Chairman.

[FR Doc. 90-3622 Filed 2-15-90; 8:45 am]

BILLING CODE 1410-09-M

## DEPARTMENT OF DEFENSE

### Department of the Air Force

#### USAF Scientific Advisory Board Meeting

February 8, 1990.

The USAF Scientific Advisory Board Ad Hoc Committee Summer Study on Technology Options and Concepts for Defeating Enemy Air Defenses will meet on 5-7 Mar 90 from 8:00 a.m. to 5 p.m. at the ANSER Corp., 1215 Jefferson Davis Hwy, Arlington, VA.

The purpose of this meeting will be to receive briefings from operational commands on their requirements and deficiencies for defeating enemy air defenses. This meeting will involve discussions of classified defense matters listed in section 552b(c) of title 5, United States Code, specifically subparagraph (1) thereof, and accordingly will be closed to the public.

For further information, contact the Scientific Advisory Board Secretariat at (202) 697-4648.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 90-3708 Filed 2-15-90; 8:45 am]

BILLING CODE 3910-01-M

## DEPARTMENT OF EDUCATION

### Notice of Proposed Information Collection Requests

**AGENCY:** Department of Education.

**ACTION:** Notice of proposed information collection requests.

**SUMMARY:** The Director, Office of Information Resources Management, invites comments on the proposed information collection requests as

required by the Paperwork Reduction Act of 1980.

**DATES:** Interested persons are invited to submit comments on or before March 19, 1990.

**ADDRESSES:** Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Jim Houser, Desk Officer, Department of Education, Office of Management and Budget, 726 Jackson Place, NW, Room 3208, New Executive Office Building, Washington, DC 20503. Requests for copies of the proposed information collection requests should be addressed to George P. Sotos, Department of Education, 400 Maryland Avenue, SW, Room 5624, Regional Office Building 3, Washington, DC 20202.

#### FOR FURTHER INFORMATION CONTACT:

George P. Sotos (202) 732-2174.

**SUPPLEMENTARY INFORMATION:** Section 3517 of the Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State of Federal law, or substantially interfere with any agency's ability to perform its statutory obligations.

The Acting Director, Office of Information Resources Management, publishes this notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following:

(1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Frequency of collection; (4) The affected public; (5) Reporting burden; and/or (6) Recordkeeping burden; and (7) Abstract. OMB invites public comment at the address specified above. Copies of the requests are available from George Sotos at the address specified above.

Dated: February 12, 1990

George P. Sotos,

Acting Director, for Office of Information Resources Management.

### Office of Postsecondary Education

**Type of Review:** Existing.

**Title:** Application for the Language Resource Center Program.

**Frequency:** Annually.

**Affected Public:** State or local governments.

**Reporting Burden:** Responses: 20.

**Burden Hours:** 900.

**Recordkeeping Burden:**

Recordkeepers: 0

**Burden Hours:** 0.

**Abstract:** This form is used to collect information needed to assess the capabilities and needs of institutions that can serve as centers for improving the nation's capacity for teaching and learning foreign languages. The Department uses this information to make grant awards.

**Type of Review:** Existing.

**Title:** State Student Incentive Grant Program—Recordkeeping Requirement.

**Frequency:** Recordkeeping.

**Affected Public:** State or local governments.

**Reporting Burden:** Responses: 0.

**Burden Hours:** 0.

**Recordkeeping Burden:**

Recordkeepers: 57.

**Burden Hours:** 29.

**Abstract:** State agencies are held accountable to the Department for evidence of students' ability to meet all statutory and regulatory requirements. Records must be maintained at the State level.

### Office of Elementary and Secondary Education

**Type of Review:** Reinstatement.

**Title:** Performance Report for High School Equivalency Program (HEP), College Assistance Migrant Program (CAMP) under title IV, section 418 of HEA of 1965, as amended.

**Frequency:** Biennially.

**Affected Public:** State and local governments; Non-profit institutions.

**Reporting Burden:** Responses: 26.

**Burden Hours:** 130.

**Recordkeeping Burden:**

Recordkeepers: 26.

**Burden Hours:** 26.

**Abstract:** The HEP and CAMP grantees that have participated in the College Assistance Migrant Program are to submit these reports to the Department. The Department uses the information to assess the accomplishment of project goals and objectives, and to aid in effective program management.

**Type of Review:** New Collection.

**Title:** Application for the Secondary Schools Basic Skills Demonstration Assistance Program.

**Frequency:** One-time.

**Affected Public:** State and local governments; Businesses or other for profit; Non-profit institutions.

**Reporting Burden:** Responses: 200.

**Burden Hours:** 4,000.

**Recordkeeping Burden:**

**Recordkeepers:** 0.  
**Burden Hours:** 0.

**Abstract:** This form will be used by local educational agencies to apply for funding under Part B of the Elementary and Secondary Act of 1965. The Department will use this information to make grant awards.

#### Office of Planning, Budget, and Evaluation

**Type of Review:** New.

**Title:** Study of Programs for Retaining the Benefits of Early Childhood Education for Disadvantaged Children—Part 3.

**Frequency:** One time.

**Affected Public:** Individuals or households; State or local governments; Businesses or other for profit; Non-profit institutions.

**Reporting Burden:** Responses: 236.

**Burden Hours:** 238.

**Recordkeeping Burden:**

Recordkeepers: 0.

**Burden Hours:** 0.

**Abstract:** The purpose of this study is to determine the accomplishments of transition programs designed to improve the school performance of disadvantaged children. Data will identify and describe transition programs in public schools and develop criteria for exemplary programs.

[FR Doc. 90-3628 Filed 2-15-90; 8:45 am]

BILLING CODE 4000-01-M

[CFDA No. 84.162]

#### Notice Inviting Applications for New Awards Under the Emergency Immigrant Education Program for Fiscal Year 1990

**Purpose:** This program provides financial assistance to State educational agencies (SEAs) for educational services and costs for eligible immigrant children enrolled in elementary and secondary public and nonprofit private schools.

**Deadline for Transmittal of Applications:** May 4, 1990.

**Deadline for Intergovernmental Review Comments:** July 3, 1990.

**Applications Available:** Application packages will be available on February 16, 1990. Application packages may be obtained by writing to the Office of Bilingual Education and Minority Languages Affairs, U.S. Department of Education, 400 Maryland Avenue, SW (Room 5086, Mary E. Switzer Building), Washington, DC 20202-6641. The Office of Bilingual Education and Minority Languages Affairs will mail application forms and program information packages to all SEAs.

**Available Funds:** \$30,144,000.

**Project Period:** 12 months.

**Programmatic Information:** An SEA may apply for a grant if it meets the eligibility requirements contained in 34 CFR 581.2. To be eligible for a grant, an SEA must submit a count of eligible immigrant children conducted during the month of March, 1990.

**Applicable Regulations:** (a) The regulations governing the Emergency Immigrant Education Program in 34 CFR part 581, and (b) the Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 76, 77, 79, 80, 81, and 85.

**For Applications or Information:** For further information contact Jonathan Chang, Office of Bilingual Education and Minority Languages Affairs, U.S. Department of Education, 400 Maryland Avenue, SW (Room 5086, Mary E. Switzer Building), Washington, DC 20202-6641. Telephone: (202) 732-5708.

**Authority:** 20 U.S.C. 4101-4108.

Rita Esquivel,

*Director, Office of Bilingual Education and Minority Languages Affairs.*

[FR Doc. 90-3629 Filed 2-15-90; 8:45 am]

BILLING CODE 4000-01-M

#### DEPARTMENT OF ENERGY

##### Office of Conservation and Renewable Energy

**Energy Conservation Program for Consumer Products; Application for Interim Waiver and Petition for Waiver of Refrigerator-Freezer Test Procedures From General Electric Appliances (RF-006)**

**AGENCY:** Conservation and Renewable Energy Office, DOE.

**SUMMARY:** Today's notice publishes a letter denying an Application for Interim Waiver from General Electric Appliances (GE) of Louisville, Kentucky, requesting relief from the existing Department of Energy (DOE) test procedure for refrigerator-freezers. DOE is denying this Interim Waiver because of conflicting and unsupported information. In addition, today's notice publishes GE's "Petition for Waiver."

GE is a manufacturer of residential appliances, including refrigerator-freezers. In both the Application for Interim Waiver and the Petition for Waiver, GE requests that the Department grant relief from the DOE test procedure relating to testing of its TFX27FK and TFX24FK model refrigerator-freezers. In addition to providing through-the-door ice service, these models also provide through-the-door beverage service by way of a second refrigerator (fresh food compartment) door. GE has termed this

feature, the "Refreshment Center." GE claims that while the TFX27FK and TFX24FK model refrigerator-freezers are capable of being tested in accordance with the DOE refrigerator-freezer test procedure for energy efficiency, the test procedure does not give a true representation of the energy consumption of models with the Refreshment Center feature. DOE is soliciting comments, data, and information respecting the Petition for Waiver.

**DATES:** DOE will accept comments, data, and information not later than March 19, 1990.

**ADDRESSES:** Written comments and statements shall be sent to: Department of Energy, Office of Conservation and Renewable Energy, Case No. RF-006, Mail Stop CE-132, Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585.

Appendices to the GE Petition for Waiver not reproduced in this notice are available by writing to the above address or telephoning (202) 586-9127.

##### FOR FURTHER INFORMATION CONTACT:

Douglass S. Abramson, U.S. Department of Energy, Office of Conservation and Renewable Energy, Mail Station CE-132, Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585, (202) 586-9127.

Eugene Margolis, Esq., U.S. Department of Energy, Office of General Counsel, Mail Station GC-12, Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585, (202) 586-9507.

#### Background

The Energy Conservation Program for Consumer Products (other than automobiles) was established pursuant to the Energy Policy and Conservation Act (EPCA), (Pub. L. 94-163), as amended by the National Energy Conservation Policy Act (NECPA), (Pub. L. 95-619), the National Appliance Energy Conservation Act of 1987 (NAECA), (Pub. L. 100-12), and the National Appliance Energy Conservation Amendments of 1988 (NAECA 1988), (Pub. L. 100-357).<sup>1</sup> The Act requires DOE to prescribe standardized test procedures to measure the energy consumption of certain consumer products, including refrigerator-freezers. The intent of the test procedures is to provide a comparable measure of energy consumption that will assist consumers

<sup>1</sup> Part B of Title III of EPCA, as amended, is referred to in this notice as the "Act." Part B of Title III is codified at 42 U.S.C. 6291-6309.

in making purchasing decisions. These test procedures appear at 10 CFR part 430, subpart B.

DOE amended the prescribed test procedures on September 26, 1980, by adding 10 CFR 430.27 creating the waiver process. 45 FR 64108. DOE further amended the Department's appliance test procedure waiver process to allow the Assistant Secretary for Conservation and Renewable Energy (Assistant Secretary) to grant an interim waiver from test procedure requirements to manufacturers that have petitioned DOE for a waiver of such prescribed test procedures. 51 FR 42823, November 28, 1986.

The waiver process allows the Assistant Secretary to waive temporarily test procedures for a particular basic model when a petitioner shows that the basic model contains one or more design characteristics which prevent testing according to the prescribed test procedures or when the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption as to provide materially inaccurate comparative data. Waivers generally remain in effect until final test procedure amendments become effective, resolving the problem that is the subject of a waiver.

The interim waiver provisions, added by the 1986 amendment, allow the Assistant Secretary to grant an interim waiver when it is determined that the applicant will experience economic hardship if the Application for Interim Waiver is denied, if it appears likely that the Petition for Waiver will be granted, and/or the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination on the Petition for Waiver.

GE has requested an Interim Waiver from the refrigerator-freezer test procedure for the TFX27FK and TFX24FK model refrigerator-freezers. GE, in the Application for Interim Waiver, requests this relief due to the implementation of energy conservation standards for refrigerator-freezers on January 1, 1990. GE states that the DOE test procedure overestimates the energy consumed by refrigerator-freezers with a Refreshment Center because it does not provide energy credits for the reduced door openings obtained with the Refreshment Center feature. GE further states that without a waiver it would have to make additional design improvements in order to increase the energy efficiency to meet energy consumption standards. GE claims that the cost expended to add the additional design improvements cannot be

recouped due to the competition in the market place. Should GE not make these design improvements or receive an Interim Waiver, the TFX27FK and TFX24FK models could not be manufactured after January 1, 1990, because they would not comply with the maximum energy consumption standard level set for models with through-the-door ice service. GE claims that the expense to incorporate the design improvements or the loss of sales for these models will cause GE to suffer economic hardship if the Application is denied.

GE also claims that it is in the public interest for an Interim Waiver to be granted. Without a waiver, GE will inaccurately represent energy consumption and cost of operation information because GE will not be able to claim the electric energy saving capabilities of the TFX27FK and TFX24FK refrigerator/freezers.

DOE has reviewed GE's Application for Interim Waiver and believes that while the extant test procedures for refrigerator-freezers may evaluate the GE TFX27FK and TFX24FK refrigerator-freezers in a manner unrepresentative of its true energy consumption, the Department has insufficient data to conclude how much, if at all, this feature would reduce energy consumption. The Department, in its notice of proposed rulemaking to amend the refrigerator-freezer test procedures, identified through-the-door features as one of a number of various new designs that may not be adequately evaluated by the test procedures. 53 FR 37416, September 26, 1988 (September 1988 proposal). No information was presented in response to the September 1988 proposal. The Department concluded in the final rulemaking that the potential for energy savings was directly affected by the consumer and the usage pattern of the feature. 54 FR 36238, August 31, 1989.

The test procedure proposed by GE requires adjusting the unit's measured energy consumption by an amount based on GE's survey and field data. The data provided by GE on total door openings per day is contradicted by data the Association of Home Appliance Manufacturers provided in its comments on the September proposal.

The Department believes that the use of a refrigerator-freezer is so random that limited field test such as GE's do not support a specific number of door openings. For this reason, the test procedure has no requirement for door openings or food loading in order to provide a basis for fair comparison of the representative unit energy consumption.

Therefore, GE's Application for an Interim Waiver, requesting relief from the DOE test procedures for its TFX27FK and TFX24FK model refrigerator-freezers with the Refreshment Center feature, is denied. This is not a determination, however, on GE's Petition for Waiver, which is being published today for comment.

GE's Petition for Waiver from the DOE test provisions for refrigerator-freezers requests an energy credit because the TFX27FK and TFX24FK model refrigerator-freezers include an additional through-the-door feature called the "Refreshment Center." The Refreshment Center provides access to beverages such as milk, soda, or juice in addition to providing ice and cold water by way of an additional door in the refrigerator (fresh food compartment) door.

GE has tested the TFX27FK and TFX24FK model refrigerator-freezers in accordance with the existing DOE refrigerator-freezer test procedure. GE claims that the test procedure does not give a true representation of the energy consumption or annual operating cost since there is no credit for reduced (regular refrigerator) door openings. The existing test procedure is a no-door-opening test which is conducted at 90°F instead of 70°F to compensate for the many variables, not included in the test procedure, such as door openings or food loading. As GE notes, the 90°F no-door-opening test was prescribed by DOE in order to obtain repeatable test results under laboratory conditions that represent typical consumer results. The test results represent the unit's anticipated energy consumption since it is performed without a load, i.e., without food or liquid, and with no door openings during the test.

GE claims that the TFX27FK and TFX24FK model refrigerator-freezers use less energy than measured by the existing test procedure because the Refreshment Center feature reduces the amount of moist ambient air that is admitted to the unit during door openings.

However, GE notes that there is a small increase in heat transfer through the Refreshment Center door due to the additional door seal and reduced door insulation. GE claims, however, that it is more than offset by the reduced door openings. GE, in a survey that included TFX27FK refrigerator-freezer owners, found that the Refreshment Center door replaced 20 openings of the fresh-food door openings per day in units so equipped. GE claims that this results in the existing test procedure overstating the TFX27FK refrigerator-freezer's true

energy consumption by 57 kilowatt hours per year. GE requests that the annual energy consumption of its TFX27FK and TFX24FK refrigerator-freezers be reduced by an amount derived from a test and calculation method proposed in its petition.

GE proposes a test method based on, to a significant extent, the existing test procedures. For TFX27FK and TFX24FK models, GE proposes to add a calculation method to determine the energy consumption adjustment for the Refreshment Center. This adjustment is based on the assumption that 20 daily fresh food door openings are replaced by 20 Refreshment center door openings. This calculation method is found in Appendix II of GE's Petition for Waiver.

The calculation method proposed by GE considers the difference in heat leakage of the refrigerator-freezer between 90 °F and 70 °F which is then adjusted by the heat gain resulting from refrigerator section door openings and refreshment center door openings. GE in its Appendix II calculates the energy savings of the Refreshment Center to be 57 Kilowatt hours per year.

In addition, GE requests a method of adjusting the energy savings of the refreshment center when the refrigerator-freezer is equipped with a compressor with an efficiency (energy efficiency ratio (EER)) other than 5.0. The 5.0 EER compressor was the basis for the tests and calculations performed by GE. The method of adjustment is the product of 57 kilowatt hours per year (energy saved with a 5.0 EER compressor) times the ratio of the new compressor EER divided by 5.0. This results in the kilowatt hours per year saved with the new compressor. For example:  $57 \times (4.54/5.0) = 51.76$  or 52 KWH/YR.

In addition to the TFX27FK and TFX24FK refrigerator-freezers, GE requests a waiver for future Refreshment Center models, designated with an 'F' in the sixth character (\*\*\*\*F\*). The waiver process is limited in scope to models specifically identified in the petition. For this reason, DOE is only considering the two models listed by GE in its filing.

Pursuant to paragraph (b) of 10 CFR 430.27, DOE is hereby publishing the "Petition for Waiver." GE's proposed amendment to the test procedure, Appendix II, and literature on its refrigerators, refrigerator-freezers, and freezers are not being published in the Federal Register. These appendices are, however, available upon request at the address provided at the beginning of today's notice. DOE solicits comments, data, and information respecting the Petition.

In addition, pursuant to paragraph (e) of § 430.27 of the Code of Federal Regulations, the following letter denying the Application for Interim Waiver was issued to General Electric Appliances.

Issued in Washington, DC, February 12, 1990.

J. Michael Davis,  
Assistant Secretary, Conservation and Renewable Energy.

Subject: Application for Interim Waiver  
August 14, 1989.

Assistant Secretary for Conservation and Renewable Energy,  
U.S. Department of Energy, Forrestal Building, Room 1-E-234, 1000 Independence Ave., SW., Washington, DC 20585.

Dear Sir. GE Appliances (GEA) hereby files this Application for Interim Waiver pursuant to 10 CFR 430.27 for waiver from the refrigerator test procedure 10 CFR Part 430, Sub-part B, Appendix A-1. This exception is necessary because GEA produces and sells two models (TFX27FK and TFX24FK) of refrigerator-freezer that incorporate a "Refreshment Center" feature. These models, when labeled according to the existing test procedure, have energy labels that inaccurately report the estimated annual cost of operation. These labels overstate the energy consumption by 3.5%.

In the event the interim waiver is denied, GEA will suffer irreparable injury because the cost of its products that include the Refreshment Center will be increased when the products are modified to meet the energy consumption standards mandated by the National Appliance Energy Conservation Act (NAECA) for January 1, 1990. The existing test procedure produces energy consumption results that are overstated by 57 Kwh/yr. Without the interim waiver, GEA must make design modifications that save at least 57 Kwh/yr for all models containing the Refreshment Center. These costs cannot be recovered in the marketplace. The energy labels, as required by the Federal Trade Commission (FTC), inaccurately report energy consumption and, therefore, these models will be unfairly compared to competitive models and brands.

GEA is not aware of any adverse impact on any other company or person which would result from the granting of this interim waiver. On the other hand, GEA is immediately harmed since we must prepare for the NAECA standards by inappropriately adding energy-saving design changes to these models.

Public policy, as stated in Public Law 94-163 as amended, encourages energy conservation. A more accurate estimate of annual operating cost of our refrigerator-freezer models will provide potential purchasers with the appropriate comparison with comparable models. Because the energy consumption is actually less than the current label indicates, potential purchasers will be more motivated to purchase these models and thereby conserve more energy.

GEA has tested these products utilizing the existing test procedures. These procedures are based on no door openings during the

test. Because the Refreshment Center has a profound effect on the number of door openings in actual use, the existing test procedure without modification cannot provide reasonably accurate results. Utilizing results from the existing test procedure will mislead consumers regarding the product's operating cost.

Concurrent with the filing of this Application for Interim Waiver we are filing a petition for waiver pursuant to 10 CFR 430.27 with the Office of Conservation and Renewable Energy. A copy of that petition, which provides the underlying support rationale for the merits of waiver, is attached for your reference. GEA believes a strong argument for waiver of the test procedure in this instance is presented and that is will be granted.

We appreciate your prompt action, and, if you have questions regarding this application, please contact the undersigned.

Respectfully submitted,

Robert M. Brown,  
Manager-Regulatory Relations, AP3-215  
Appliance Park, Louisville, KY 40225, (502)-452-3404.

#### Petition for Waiver Refrigerator-Freezer Test Procedures

#### 10 CFR 430, Subpart B, Appendix A-1

Pursuant to 10 CFR 430.27, GE Appliances (GEA) respectfully petitions for a waiver to the requirements 10 CFR part 430, Subpart B, Appendix A-1 adopted August 10, 1982.

#### Background Information

GE Appliances (GEA) manufacturers and sells refrigerator-freezers among many other major home appliances. It has been and continues to be the objective of GEA to provide the users of its products with the highest quality and performance. One improvement we have developed for refrigerator-freezers provides a substantial benefit to the owner and a major convenience improvement to the users of certain models. We call this improvement a "Refreshment Center". This feature provides users with easy access to the most used items in the fresh-food section of these models without opening the large door. The use of this feature results in considerable energy savings; however, the existing test procedure does not accurately reflect the energy consumption during in-house usage.

#### Refreshment Center Description

The Refreshment Center is a storage compartment within the door of the fresh-food section of refrigerator-freezers. The Refreshment Center is currently used in the side-by-side product class of refrigerator-freezers. Appendix I includes a brochure which has photographs of the Refreshment Center. A built-in counter, which serves

as the access door of the Refreshment Center, drops down to provide a handy serving space for snacks and beverages. In the down position the user has instant access to items in the Refreshment Center is such that very large containers, such as one-gallon milk and juice containers and three-liter bottles, can be stored for easy access. Milk, softdrinks and juice are among the most often used items in the fresh-food storage. The availability of cold water, cubed and crushed ice dispenser conveniently located adjacent to the Refreshment Center provides a complete refreshment center that substantially reduces the number of times per day that the main fresh-food door needs to be opened.

When the fresh-food door is opened, the cold air spills out of the storage cavity because it is heavier than the ambient air. The air exchange adds moisture to the storage cavity and, therefore, increases the need for defrost. Opening of the Refreshment Center access door does not allow spilling of the air in the fresh-food section because the rear of the Refreshment Center cavity is closed, except for small openings on the rear panel; therefore, the only air exchange is the small amount in the Refreshment Center cavity.

#### *Refreshment Center Effect on Energy Consumption*

The Refreshment Center affects the energy consumption of refrigerator-freezer models that incorporate this feature, compared to models without the feature, in two distinct ways. First, there is a small increase in energy consumption due to the Refreshment Center door seal. Second, there is a substantial reduction in energy due to the reduced door openings. A survey of test panel users of the refrigerator-freezer provided results showing that the Refreshment Center was opened 55% as many times as the main fresh-food door. On a different test panel monitored over the course of a year, we have measured door openings of the fresh-food section and found the mean to be 60 openings per day.

Appendix II contains calculations based on the following door opening schedule per day:

Storage section	Openings per day
Fresh Food with RC.....	40
Refreshment Center (RC) .....	20

The total openings per day are 90 with or without the Refreshment Center. The results of the calculations show that the existing test procedure overstates the energy consumption by 57 Kilowatt hours per year. The energy consumption on Model TFX27F is overstated by 3.5%.

#### *Existing Test Procedure Problems*

The existing test procedures is performed without door openings even though it is recognized that the doors will be opened in actual use. This procedure was adopted in order to obtain repeatable test results under laboratory conditions. To compensate for not opening the doors, the ambient temperature was increased to 90 °F instead of the more normal level of 70 °F. This, of course, increases the heat flow through the insulation in the refrigerator-freezer. The resulting energy consumption at 90 °F with no door openings was shown to correlate reasonably well with in-house usage, at the time the test procedure was adopted.

Since the Refreshment Center has a profound effect on the number of times the fresh food section of the product is opened, the existing test procedure cannot accurately reflect the energy consumption of the models containing the Refreshment Center. The existing procedure includes the effect of heat gain through the Refreshment Center door seal, but it does not correct for the savings due to the reduction in fresh food door openings.

#### *GEA Laboratory Test Results*

In an attempt to demonstrate the energy consumption overstatement effect of the existing test procedure, GEA tested two samples of Model TFX27F in our laboratory. Mechanisms to operate the fresh food door and the Refreshment Center door were installed. The mechanisms held the fresh food door open 12 seconds and the Refreshment Center door open 18 seconds.

Appendix III includes the results of tests with differing door opening schedules. Tests were run with 60 fresh food door openings and 0 Refreshment Door openings per 24 hour period, and with 40 fresh food door openings and 20 Refreshment Center door openings per 24 hour period. The results of these tests illustrate that with the Refreshment Center door opening replacing one-third

of the fresh food door openings, the energy consumption is reduced by 66 Kilowatt-hours per year for the two samples tested. To compare these results with the calculated results, a correction to the test results must be made to estimate the savings because these samples used a 5.0 EER compressor. Our current production models that contain the Refreshment Center utilize a 4.54 EER compressor. To calculate the savings if a 4.54 EER compressor were used instead of the 5.0 EER, the following equation must be used:

$$E_{4.54} = E_{5.0} \times 4.54$$

where

$E_{4.54}$  = Energy using 4.54 EER compressor

$E_{5.0}$  = Energy using 5.0 EER compressor

$$E_{4.54} = 66 \text{ [Kwh/yr]} \times \frac{5.0}{4.54} = 73 \text{ Kwh/yr}$$

Comparing the test results in Appendix III with the calculated results in Appendix II, the calculations appear to be conservative in estimating the annual energy savings.

Test Results = 73 Kwh/yr  
Calculated results = 57 Kwh/yr

#### *GEA's New Model Refrigerator-Freezers*

GEA currently offers two Refreshment Center models: TFX24FK and TFX27FK. We may choose to have more models at some future date. If so, the models can be readily identified since they will contain the letter "F" in the sixth alphanumeric designator; for example, xxxxxFx. We are requesting a waiver for all models that include the Refreshment Center. The energy use correction for the current models will be 57Kwh/yr applied to the existing test results.

#### *GEA Should Not Be Required To Use The Existing Test Procedure*

If GEA is not granted a waiver from the existing test procedure, it will be forced to add cost to the product in order to meet the energy consumption standards established by the National Appliance Energy Conservation Act (NAECA) effective January 1, 1990. This additional cost will be inappropriate because the existing test procedure does not recognize the energy saving characteristic of the Refreshment

Storage section	Openings per day
Freezer.....	30
Fresh Food w/o RC.....	60

Center. Without a waiver the energy label required by the Federal Trade Commission will cause GEA to be disadvantaged because the label will overstate the energy consumption and GEA's models will be unfairly compared to competitive products.

#### *Substitute Test Procedure*

GEA believes that a suitable substitute test procedure can be utilized to more accurately reflect the actual energy usage of models equipped with a Refreshment Center. We propose to reduce the results from DOE's standard test procedure through calculations of the effect of changing the door openings from normal operation. Heat gain calculations should be made to demonstrate the magnitude of the overstatement of energy consumption in the DOE test procedure. The heat gain difference should be translated to Kilowatt-hours per year, and then subtracted from the measured results at 90°F NDO DOE test. The translation of the heat gain to Kilowatt-hours per year should be accomplished as shown on page 8 of Appendix II. This translation takes into account the EER of the compressor applied to the refrigerator-freezer. If the compressor EER changes, the value to be subtracted from the existing test results would change. For example, the test results in Appendix III were obtained using a 5.0 EER compressor. The overstatement of energy consumption using the 5.0 EER in the calculations in Appendix II would be:

$$57 \times \frac{4.54}{5.00} = 52 \text{ Kwh/yr.}$$

#### *Affected Persons*

GEA knows of no person or persons that will be adversely affected by granting this waiver.

#### *Similar Design Models*

GEA's Refreshment Center design is patented by us and we know of no similar designs. However, there are competitive models that have an access door within the fresh-food door. We are not aware of the energy consumption characteristics of these competitive models.

#### *Public Policy Considerations*

The objective of Public Law 94-163 is energy conservation as mandated by sections 324 and 325. The test procedures established under section 323 should be modified to take into account new technological

developments that can contribute to the achievement of energy conservation objectives. 10 CFR 430.27 provides the means to accomplish test procedure modifications and it is in the public interest to do so in this case, thereby facilitating more accurate energy consumption and cost of operation information.

Respectfully submitted,

Robert M. Brown,

*Manager-Regulatory Relations, GE  
APPLIANCE, AP3-215, Appliance Park,  
Louisville, KY 40225, (502) 452-3404.*

February 12, 1990.

Mr. Robert M. Brown,

*Manager-Regulatory Relations, General  
Electric Appliances, AP 3-215 Appliance  
Park, Louisville, KY 40225.*

Dear Mr. Brown: This is in response to your August 14, 1989, Application for Interim Waiver from the Department of Energy (DOE) test procedure for refrigerators and refrigerator-freezers used to rate General Electric Appliances' (GE) models TFX27FK and TFX24FK with the "Refreshment Center" feature.

GE seeks an interim waiver from the DOE test procedures for refrigerator-freezers for its TFX27FK and TFX24FK models because they include an additional through-the-door feature called the "Refreshment Center." The Refreshment Center is a second refrigerator door that provides access to beverages such as milk, soda, or juice stored on a door shelf.

GE states that while the TFX27FK and TFX24FK model refrigerator-freezers are capable of being tested for energy consumption and annual operating cost in accordance with the existing DOE test procedure, the test procedure does not give a true representation of the energy consumption or annual operating cost. This statement is based on the fact that the DOE test is a no-door-opening test and no credit is given to features that reduce the number of refrigerator door openings. GE claims that the TFX27FK and TFX24FK models save energy because access to beverages through a second, smaller door causes for less transfer of moist ambient air, reducing the heat gain and thereby reducing energy consumption. GE requests that a credit for the energy savings from Refreshment Center models in the amount of 57 kilowatt hours be subtracted from the annual kilowatt hour (KWH) consumption.

CE requests permission to test and rate the TFX27FK and TFX24FK refrigerator-freezer models with the "Refreshment Center" by using the existing DOE test procedure and applying a credit determined by a calculation formula that replaces the heat gain from 20 regular refrigerator door openings with the heat gain of 20 of the Refreshment Center door openings in the daily energy consumption. GE believes that the Refreshment Center feature credit to annual energy consumption is estimated at 57 KWH/YR. GE also provides a method by which the energy consumption credit of models

equipped with different efficiency compressors can be calculated.

DOE has reviewed GE's Application for Interim Waiver and believes that while the extant test procedures for refrigerator-freezers may evaluate the GE TFX27FK and TFX24FK model refrigerator-freezers in a manner unrepresentative of its true energy consumption, insufficient data is available from which to conclude how much energy is saved. The Department, in its notice of proposed rulemaking to amend the refrigerator-freezer test procedures (the September proposal), identified through-the-door features as one of a number of various new designs which had the potential to save energy (53 F.R. 37416, September 26, 1988). DOE concluded that the potential for energy savings was directly affected by the consumer and the use of the feature.

The test procedure proposed by GE requires adjusting the unit's measured energy consumption by an amount based on GE's survey and field data. The data provided by GE on total door openings per day is contradicted by data from the Association of Home Appliance Manufacturers provided in its comments on the September proposal.

The Department believes that the use of a refrigerator-freezer is so random that limited field tests such as GE's do not support a specific number of door openings. For this reason, the test procedure has no requirement for door openings or food loading in order to provide a basis for fair comparison of the representative unit energy consumption.

Therefore, GE's Application for an Interim Waiver requesting relief from the DOE test procedures for its TFX27FK and TFX24FK model refrigerator-freezers, with the Refreshment Center feature, is denied.

The Department does not infer by this denial that the Petition for Waiver will be unsuccessful. DOE is reserving judgement until it obtains sufficient information to make a fair and impartial decision.

Sincerely,

J. Michael Davis,

*Assistant Secretary, Conservation and  
Renewable Energy.*

[FR Doc. 90-3724 Filed 2-15-90; 8:45 am]

BILLING CODE 6450-01-M

#### **Federal Energy Regulatory Commission**

**[Docket No. QF90-81-000]**

**Cogentrix of Richmond, Inc.;  
Application for Commission  
Certification of Qualifying Status of a  
Cogeneration Facility**

February 9, 1990.

On February 1, 1990, Cogentrix of Richmond, Inc. (Applicant) of 9405 Arrowpoint Boulevard, Charlotte, North Carolina, 28217, submitted for filing an application for certification of a facility as a qualifying cogeneration facility pursuant to § 292.207 of the Commission's regulations. No

determination has been made that the submittal constitutes a complete filing.

The topping-cycle cogeneration facility will be located near the Du Pont Spruance Facility, Chesterfield County, Virginia. The facility will consist of eight stoker-fired boilers, four extracting/condensing steam turbine generators, and appurtenant facilities. The net electric power production capacity will be 224.2 MW. The steam produced from the facility will be used in the production of synthetic fibers. The primary energy source will be coal.

Any person desiring to be heard or objecting to the granting of qualifying status should file a petition to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such petitions or protests must be filed within 30 days after the date of publication of this notice and must be served on determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

**Lois D. Cashell,**  
Secretary.

[FR Doc. 90-3650 Filed 2-15-90; 8:45 am]  
BILLING CODE 6717-01-M

[Docket No. RP89-209-002]

#### K N Energy, Inc.; Request for Waiver

February 9, 1990.

Take notice that on February 5, 1990, K N Energy, Inc. (KN) filed a Request for Waiver of Certain Tariff Provisions and Compliance Filings. KN requests waiver of certain provisions of its FERC Gas Tariff, Original Volume No. 1-B, relating to flow through of pipeline supplier buyout/buydown costs. KN also requests waiver of certain compliance filings required by the Commission's September 19, 1989 order which stated that KN was required to track "...any modifications to CIG's underlying buyout-buydown recovery filings in Docket Nos. RP89-98-000, RP89-133-000 and RP89-178-000 of subsequent dockets."

KN states that on October 23, 1989, Colorado Interstate Gas Company (CIG) filed to reflect the elimination of all costs associated with transportation discounts and the elimination of the associated annual reconciliation procedures. It states that on December 4,

1989, it made a filing to track CIG's filing, believing it to be a compliance filing. On January 9, 1990, the Commission rejected KN's December 4 filing stating that the application could not be processed until a fee or petition for waiver is filed.

KN states that on December 20, 1989, CIG filed a request for waiver of certain tariff provisions, which was granted by the Commission on January 29, 1990. Since the Commission granted CIG's request, KN now requests that it be allowed to track any revisions CIG makes.

KN states that for it to make the compliance filing in response to CIG's October 23 compliance filing at this time would create additional work on the part of the Commission Staff and be burdensome for KN. Without this waiver, KN states that it would have to make numerous tracking filings causing an administrative and economic burden. KN states that in many instances, the amounts it would track are less than the tracker filing fee.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.214, 385.211 (1989)). All such protests should be filed on or before February 18, 1990. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Persons that are already parties to this proceeding need not file a motion to intervene in this matter. Copies of this filing are on file with the Commission and are available for public inspection.

**Lois D. Cashell,**  
Secretary.

[FR Doc. 90-3651 Filed 2-15-90; 8:45 am]  
BILLING CODE 6717-01-M

#### ENVIRONMENTAL PROTECTION AGENCY

[FR-FRL-3724-9]

#### Environmental Impact Statements; Notice of Availability

**Responsible Agency:** Office of Federal Activities, General Information (202) 382-5073 or (202) 382-5076.

Availability of Environmental Impact Statements Filed February 5, 1990 Through February 9, 1990 Pursuant to 40 CFR 1506.9.

**EIS No. 900043, Final, BLM, OR, Oregon Statewide Wilderness Study Areas,**

Wilderness Designation, Additional Lands, several, Due: March 19, 1990, Contact: Jerry Magee (503) 231-6867.

**EIS No. 900044, Final, BLM, NV, Nevada Contiguous Lands Wilderness Recommendations, Designation or Nondesignation, Clark, Lincoln, White Pine and Humboldt Counties, NV, Due: March 19, 1990, Contact: Dave Wolf (702) 328-6283.**

**EIS No. 900045, Draft, AFS, CA, Sierra Ski Ranch Area Project, Expansion, Eldorado National Forest, Special Use Permit and Section 404 Permit, Eldorado County, CA, Due: April 2, 1990, Contact: Brian Morris (916) 622-5061.**

**EIS No. 900046, Draft, FHW, MI, U.S. 131 Improvement and Relocation, South of Cadillac to North of Manton, Funding and Section 404 Permit, Wexford County, MI, Due: April 2, 1990, Contact: James Kirscheneiner (517) 377-1851.**

**EIS No. 900047, DSuppl, AFS, WA, Early Winters Alpines Sport Site Development, Sandy Butte Ski Resort, Additional Information Concerning Alternatives and Air Quality Impacts on The Pasayten Wilderness, Okanogan National Forest, Mazama and Okanogan Counties, WA, Due: May 17, 1990, Contact: John R. Hook (509) 422-2704.**

**EIS No. 900048, DSuppl, NOAA, PAC, WA, OR, CA, Pacific Coast Groundfish Fishery Management Plan (FMP), Updated Information and Changes to the Current FMP, Amendment No. 4, CA OR and WA, Due: April 2, 1990, Contact: Dr. William W. Fox, Jr. (301) 427-2239.**

#### Amended Notices

**EIS No. 890344, Final, EPA, FL, CF Mining Complex II, Open Pit Phosphate Mine and Beneficiation Plan, Construction and Operation, NPDES and 404 Permits, Hardee County, FL, Due: February 28, 1990, Contact: Heinz J. Mueller (404) 347-3776. Published FR 12-15-89—Review period extended.**

**EIS No. 890370, Draft, FAA, OH, Toledo Express Airport Expansion, Airport Layout Plan, Approval and Funding, Lucas County, OH, Due: February 27, 1990, Contact: Leslie S. Haener (313) 942-3341. Published FR 1-5-90—Review period extended.**

**EIS No. 890355, DSuppl, COE, CT, NY, Western Long Island Sound (WLIS III), Dredged Material Disposal Site, Designation, CT and NY, Due: February 26, 1990, Contact: Dr. Thomas Fredette (617) 647-8563. Published FR 12-29-89—Review period extended.**

Dated: February 13, 1990.

**William D. Dickerson,**

Deputy Director, Office of Federal Activities.  
[FR Doc. 90-3725 Filed 2-15-90; 8:45 am]

BILLING CODE 6560-50-M

[ER-FRL-3725-1]

#### Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared January 29, 1990 through February 2, 1990 pursuant to the Environmental Review Process (ERP), under section 309 of the Clean Air Act and section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at (202) 3823-5076.

An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated April 7, 1989 (54 FR 15006).

#### Final EISs

**ERP No. FS-FHW-J40030-UT, US 189**  
Construction, Improvements, Utah  
Valley to Heber Valley Project, US 189  
Widening and Realignment, UT-52 to  
US 40, Funding and 404 Permit, Utah and  
Wasatch Counties, UT

**Summary:** EPA has no objection to the proposed action as described.

Dated: February 13, 1990.

**William D. Dickerson,**

Deputy Director, Office of Federal Activities.  
[FR Doc. 90-3726 Filed 2-15-90; 8:45 am]

BILLING CODE 6560-50-M

[FRL 3724-1]

#### Science Advisory Board; Closed Meeting

Under Public Law 92-463 notice is hereby given that a meeting of an ad-hoc Subcommittee of the Science Advisory Board will be held in Washington, DC, on March 5-6, 1990, to determine the recipients of the Agency's 1989 Scientific and Technological Achievement Cash Awards. These awards are established to give honor and recognition to EPA employees who have made outstanding contributions in the advancement of science and technology through their research and development activities, and who have published their results in peer reviewed journals.

Pursuant to the appropriate provision of the Federal Advisory Committee Act section 10(d) of 5 U.S.C., appendix 1,

and the appropriate provision of the Government in the Sunshine Act, 5 U.S.C. 552b(c)(6), I hereby determine that this meeting is concerned with information exempt from disclosure, and in determining the actual cash amount of each award, the Agency requires full and frank advice from the Science Advisory Board. This advice will involve professional judgments on those employees whose published research results are deserving of a cash award as well as those that are not. In addition, the Board will advise on the amount of money to be allocated for each award. Discussions of such a personal nature, where disclosure would constitute an unwarranted invasion of personal privacy, are exempt under section 10(d) of title 5, United States Code, appendix 1. In accordance with the provisions of the Federal Advisory Committee Act, minutes of the meeting will be kept for Agency and Congressional review.

The Science Advisory Board shall be responsible for maintaining records of the meeting and for providing an annual report setting forth a summary of the meeting consistent with the policy of 5 U.S.C., appendix 1, section 10(d).

**For Further Information Contact:**  
Donald G. Barnes at (202) 382-4126.

Dated: February 6, 1990.

**William K. Reilly,**  
Administrator.

[FR Doc. 90-3731 Filed 2-15-90; 8:45 am]

BILLING CODE 6560-50-M

[FRL-3725-2]

#### Public Water Supply Supervision Program: Program Revision for the State of Ohio

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the State of Ohio is revising its approved State Public Water Supply Supervision Primary Program. Ohio has adopted (1) drinking water regulations for eight volatile organic chemicals that correspond to the National Primary Drinking Water regulations for Volatile Organic Chemicals for eight volatile organic chemicals promulgated by EPA on July 8, 1987, (52 FR 25690) and (2) public notice regulations that correspond to the revised EPA public notice requirements promulgated on October 28, 1987, (52 FR 41534). EPA has determined that these two sets of State

program revisions are no less stringent than the corresponding Federal regulations. Therefore, EPA has tentatively decided to approve these State program revisions.

All interested parties are invited to request a public hearing. A request for a public hearing must be submitted within 30 days from the date of this Notice to the Regional Administrator at the address shown below. If requests which indicate sufficient interest and/or significance are received by the end of this Notice period, a public hearing will be held. If no timely and appropriate request for a hearing is received and the Regional Administrator does not elect to hold a hearing on his own motion, this determination shall become effective 30 days from this Notice date.

Any request for a public hearing shall include the following (1) The name, address, and telephone number of the individual, organization; or other entity requesting a hearing. (2) A brief statement of the requesting person's interest in the Regional Administrator's determination and of information that the requesting person intends to submit at such hearing. (3) The signature of the individual making the request; or, if the request is made on behalf of an organization or other entity, the signature of a responsible official of the organization or other entity.

**ADDRESSES:** All documents relating to this determination are available for inspection between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, at the following offices:

Division of Public Drinking Water, Ohio Environmental Protection Agency,  
1800 WaterMark Drive, Columbus,  
Ohio 43266-0149; and  
Regional Administrator, Environmental Protection Agency, Region V, 230 South Dearborn Street, Chicago,  
Illinois 60604-1586.

**FOR FURTHER INFORMATION CONTACT:**  
William D. Spaulding, Region V,  
Drinking Water Section at the Chicago address given above; telephone 312/866-9262, (FTS) 888-9262.

(Sec. 1413 of the Safe Drinking Water Act, as amended, (1986) and 40 CFR 142.10 of the National Primary Drinking Water Regulations)

**Valdas V. Adamkus,**  
Regional Administrator, EPA, Region V.  
[FR Doc. 90-3732 Filed 2-15-90; 8:45 am]  
BILLING CODE 6560-50-M

[RFL-3724-5]

**Approval of North Dakota's National Pollutant Discharge Elimination System (NPDES) General Permit Program and of the North Dakota Authority To Issue NPDES Permits to Federal Facilities****AGENCY:** Environmental Protection Agency.**ACTION:** Notice of final approval of modifications to North Dakota's General NPDES Program and North Dakota's authority to issue NPDES permits to Federal facilities.

**SUMMARY:** On January 22, 1990, the Regional Administrator of Region VIII of the Environmental Protection Agency (EPA) approved modifications to the State of North Dakota's National Pollutant Discharge Elimination System (NPDES) permit program thereby authorizing the State to issue general NPDES permits and to issue NPDES permits to Federal facilities. Under the general permit authority, North Dakota may now issue general permits in lieu of individual permits consistent with the requirements of the North Dakota NPDES program and the Federal NPDES Regulations at 40 CFR 122.28. EPA's recognition of North Dakota's authority over Federal facilities provides that the State will begin issuance of individual permits to Federal facilities in lieu of EPA's issuance of such permits. This delegation of the responsibility to issue permits to Federal facilities does not include permits issued to either Indian Tribes or to persons located within Federal Indian Reservations. Such Indian permits shall continue to be issued by EPA.

**FOR FURTHER INFORMATION CONTACT:** Marshall Fischer, Compliance Branch (8WM-C), Water Management Division, U.S. Environmental Protection Agency, 999 18th Street, Denver, Colorado 80202-2405.

**SUPPLEMENTARY INFORMATION:** Section 402(b) of the Clean Water Act provides that a State may be approved to operate a permit program in lieu of the Federal NPDES permit program. North Dakota initially received such approval on June 13, 1975. The NPDES program regulations at 40 CFR 123.62 set forth the procedures for EPA to process modifications to an approved state program. On September 20, 1989, the State of North Dakota submitted two

separate packages requesting modification of its NPDES program to include authorization to issue general permits and to issue permits to Federal facilities. Pursuant to those regulations, EPA determined the request for general permit authority to be a substantial program modification requiring the opportunity for public participation. EPA determined requests for authorization to issue Federal facility permits to be a non-substantial program modification as defined by these regulations.

**1. General Permits**

EPA published an October 18, 1989 *Federal Register* notice requesting comments on the State of North Dakota's general permit package submitted on September 20, 1989 (see 54 FR 42841). The package contained a letter from the State asking for approval, a copy of a revision to the Memorandum of Agreement (MOA) between EPA and the State regarding how the general permit program would be implemented, a supplement to the NPDES program description specific to the general permit program activities, and copies of relevant State statutes and regulations. North Dakota's general permit program was designed to address short term discharges, as well as discharges with substantially similar character and requiring similar regulatory controls. Types of discharges which might be covered by the North Dakota general permit program include hydrostatic testing and dewatering activities, backwash water discharges from portable water treatment plants, and certain types of stormwater discharges.

North Dakota's general permit program submittal also included a statement by the Attorney General certifying, with appropriate citations to the statutes and regulations, that the State has adequate legal authority to administer a general permit program. An additional Attorney General's statement, dated November 22, 1989, provided supplementary information regarding the State's authority to implement a general permit program.

During the thirty day public comment period EPA received only one written comment letter. That letter fully supported approval of the general NPDES program authority. After having reviewed each of the documents prepared and submitted and having considered all comments received, on January 22, 1990, EPA notified the State

that modification of its NPDES program to include general permit authority was approved.

**2. Federal Facilities**

In 1977 Congress amended section 313 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) to authorize States to regulate federally owned or operated facilities under their own water pollution control program. Prior to that amendment, States, including North Dakota, were precluded from regulating Federal facilities and EPA remained responsible for issuing NPDES permits, as required, to these Federal facilities.

On September 20, 1989, North Dakota submitted a request for modification to its approved NPDES permit program to include authorization by EPA to issue permits to federally owned and/or operated facilities. The modification request included a letter from the State asking for approval, a copy of a revision to the MOA between EPA and the State clarifying that Federal facilities would be subject to the same requirements as any other facility in North Dakota, a description as to what affect this change will have on the North Dakota program, and an Attorney General's statement certifying as to the authority being relied upon by the State to assert jurisdiction over Federal facilities. Because of the structure of the existing North Dakota statutes and regulations, no specific regulatory modification was deemed necessary for North Dakota to make such a demonstration. Consequently, this change was determined to be a non-substantial program modification. After having reviewed each of the documents prepared and submitted and having considered all comments received, on January 22, 1990, EPA notified the State that modification of its NPDES program to include Federal facility authority was approved. EPA has concluded that the State will have the necessary procedures and resources to administer the general permits and Federal facilities programs.

***Federal Register Notice of Approval of State NPDES Programs or Modifications***

EPA will provide *Federal Register* notice of any action by the Agency approving or modifying a state NPDES program. The following table provides the public with an up-to-date list of the status of NPDES permitting authority throughout the country.

State	Approved state NPDES permit program	Approved to regulate Federal facilities	Approved general NPDES permit program	Approved state pretreatment program
Alabama.....	10/19/79	10/19/79	No .....	10/19/79
Arkansas.....	11/01/86	11/01/86	Yes .....	11/01/86
California.....	05/04/73	05/05/78	Yes .....	09/22/89
Colorado.....	03/27/75		Yes .....	
Connecticut.....	09/26/73	01/09/89	No .....	08/03/81
Delaware.....	04/01/74		No .....	
Georgia.....	06/28/74	12/08/80	No .....	03/12/81
Hawaii.....	11/28/74	06/01/79	No .....	08/12/83
Illinois.....	01/23/77	09/20/79	Yes .....	
Indiana.....	01/01/75	12/09/78	No .....	
Iowa.....	08/10/78	08/10/78	No .....	08/03/81
Kansas.....	06/28/74	08/28/85	No .....	
Kentucky.....	09/30/83	09/30/83	Yes .....	
Maryland.....	09/05/74	11/10/87	No .....	09/30/85
Michigan.....	10/17/73	12/09/79	No .....	06/07/83
Minnesota.....	06/30/74	12/09/78	Yes .....	07/16/79
Mississippi.....	05/01/74	01/28/83	No .....	05/12/82
Missouri.....	10/30/79	06/26/79	Yes .....	06/03/81
Montana.....	06/10/74	06/23/81	Yes .....	
Nebraska.....	06/12/74	11/02/79	Yes .....	09/07/84
Nevada.....	09/19/75	08/31/78	No .....	
New Jersey.....	04/13/82	04/13/82	Yes .....	04/13/82
New York.....	10/28/75	06/13/80	No .....	
North Carolina.....	10/19/75	09/28/84	No .....	06/14/82
North Dakota.....	06/13/75	01/22/90	Yes .....	
Ohio.....	03/11/74	01/28/83	No .....	07/27/93
Oregon.....	09/26/73	03/02/79	Yes .....	03/12/81
Pennsylvania.....	06/30/78	06/30/78	No .....	
Rhode Island.....	09/17/84	09/17/84	Yes .....	09/17/84
South Carolina.....	06/10/75	09/26/80	No .....	04/09/82
Tennessee.....	12/28/77		No .....	08/10/83
Utah.....	07/07/87	07/07/87	Yes .....	07/07/87
Vermont.....	03/11/74		No .....	03/16/82
Virgin Islands.....	06/30/76		No .....	
Virginia.....	03/31/75	02/09/82	No .....	04/14/89
Washington.....	11/14/73		Yes .....	09/30/86
West Virginia.....	05/10/82	05/10/82	Yes .....	05/10/82
Wisconsin.....	02/04/74	11/26/79	Yes .....	12/24/80
Wyoming.....	01/30/75	05/18/81	No .....	

**Review Under Executive Order 12291  
and the Regulatory Flexibility Act**

The Office of Management and Budget has exempted this rule from the review requirements of Executive Order 12291 pursuant to section 8(b) of that Order.

Under the Regulatory Flexibility Act, EPA is required to prepare a Regulatory Flexibility Analysis for all rules which may have a significant impact on a substantial number of small entities. Approval of the subject modifications to the North Dakota NPDES permit program establishes no new substantial requirements, nor does it materially alter the regulatory control over any municipal or industrial category. Because this notice does not have a significant impact on a substantial number of small entities, a Regulatory Flexibility Analysis is not necessary. Accordingly, I hereby certify pursuant to 5 U.S.C. 605(b) that approval of these two programs (i.e., general permits and Federal facilities) changes to the North Dakota NPDES delegation will not have a significant impact on a substantial number of small entities.

Dated: February 7, 1990.

**Jack W. McGraw,**

*Acting Regional Administrator, Region VIII.*

[FIR Doc. 90-3733 Filed 2-15-90; 8:45 am]

BILLING CODE 6560-50-M

[PP OF3843/PF-531; FRL-3710-2]

**Pesticide Tolerance Petition for Dicloran**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** This notice announces the filing of a pesticide petition proposing to establish a tolerance of 2.0 parts per million (ppm) for residues of the fungicide dicloran, 2,6-dichloro-4-nitroaniline, in or on the raw agricultural commodity apples for 1 year.

**DATES:** Comments, identified by the document control number, [PP OF3843/PF-531], must be received on or before February 26, 1990.

**ADDRESSES:** By mail, submit written comments to: Information Branch, Field Operations Division (H-7506C), Office

of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, deliver comments to: Rm. 248, CM #2, Environmental Protection Agency, 1921 Jefferson Davis Hwy., Arlington, VA 22202.

Information submitted as a comment concerning this notice may be claimed confidential by marking any part or all of that information as "Confidential Business Information" (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked "confidential" may be disclosed publicly by EPA without prior notice. All written comments will be available for public inspection in Rm. 248 at the address given above, from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

**FOR FURTHER INFORMATION CONTACT:** By mail: Susan T. Lewis, Product Manager (PM) 21, Registration Division,

Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 227, CM #2, 1921 Jefferson Davis Hwy., Arlington, VA 22202, (703)-557-1900.

**SUPPLEMENTARY INFORMATION:** EPA has received pesticide petition (PP) 0F3843 from NOR-AM Chemical Co., 3509 Silverside Rd., P.O. Box 7495, Wilmington, DE 19803, proposing to amend 40 CFR 180.200 by establishing a tolerance to permit residues of the fungicide dicloran, 2,6-dichloro-4-nitroaniline, in or on apples at 2.0 parts per million (ppm). The proposed analytical method for determining residues is gas chromatography.

As provided for in the Administrative Procedure Act (5 U.S.C. 553(d)(3)), the comment period is shortened to less than 30 days for good cause shown since a large quantity of Granny Smith apples (already treated with dicloran as a post-harvest use) are in cold storage and are starting to spoil.

Authority: 7 U.S.C. 136a.

Dated: February 13, 1990.

Anne E. Lindsay,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 90-3811 Filed 02-15-90; 8:45 am]

BILLING CODE 6560-50-D

## FEDERAL MARITIME COMMISSION

### Notice of Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., room 10220. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 224-010968-005.

Title: Maryland Port Administration/Hapag-Lloyd AG/Atlantic Division Terminal Agreement.

Parties: Maryland Port Administration/Hapag-Lloyd AG/Atlantic Division.

Synopsis: The Agreement extends the basic agreement on a month-to-month

basis for a term of three months beginning February 9, 1990, and pending the final negotiations of a long term lease.

Agreement No.: 224-010896-003.

Title: Maryland Port Administration/Moller Steamship Company, Inc. (Maersk) Terminal Agreement.

Parties: Maryland Port Administration/Moller Steamship Company, Inc. (Maersk).

Synopsis: The Agreement amends Agreement No. 224-010896 which provides for Maersk's use of certain portions of MPA's Dundalk Marine Terminal (premises) located in Baltimore, Maryland. The Agreement provides that preferential usage of the premises will be granted to Maersk as follows: On even weeks, between 7 a.m. on Thursday and 6 a.m. on Saturday; on odd weeks, between 6 p.m. on Thursday and 6 a.m. on Saturday. Maersk will no longer require usage of the premises to service its vessel calls between 6 a.m. Saturday through 6 a.m. Sunday.

By Order of the Federal Maritime Commission.

Dated: February 12, 1990.

Joseph C. Polking,

Secretary.

[FR Doc. 90-3685 Filed 2-15-90; 8:45 am]

BILLING CODE 6730-01-M

### Docket No. 90-07

### Credit Practices of Sea-Land Service, Inc. and Nedlloyd Lijnen, B.V.; Order to Show Cause

Sea-Land Service, Inc. ("Sea-Land") and Nedlloyd Lijnen, B.V. ("Nedlloyd")<sup>1</sup> and are members of the South Europe/U.S.A. Freight Conference ("SEUSA"). SEUSA's tariff rules for the payment of charges on collect shipments require that "freight must be paid against the delivery of the cargo, unless otherwise specified in the essential terms (E.T.) of Service Contracts".<sup>2</sup> However, Carriers have caused to be published, through independent action, notations to the commodity rates for the specific items<sup>3</sup> which result in exceptions to the provisions of the SEUSA tariffs relating to the payment of collect freight charges for shippers or consignees of the specified commodities.<sup>4</sup>

<sup>1</sup> Collectively, these companies will be referred to in this Order as "Carriers".

<sup>2</sup> SEUSA Conference Rules Tariffs-FMC No. 1 ("Rules Tariff No. 1") and SEUSA Conference Intermodal Rules Tariff-FMC No. 3, Rule 7 ("Rules Tariff No. 3").

<sup>3</sup> The commodity groups generally specified are wines and spirits or other alcoholic or non-alcoholic beverages including mineral water.

<sup>4</sup> Sea-Land initially took independent action from SEUSA's Rule 7 in the Rules Tariffs to provide for

After identifying the specific Carrier for which the exception applies, the exceptions provide as follows:

On freight collect shipments, carrier may extend credit facilities to any shipper or consignee of this specific commodity for payment of applicable rates and charges in this tariff from the first working day, following receipt of carrier's invoice by shipper or its designated payment agent, to the 14th day thereafter or, if that day is not a working day, to the first working day thereafter. Invoice shall be promptly rendered by carrier and paid within said credit period.<sup>5</sup>

Section 10(b) of the Shipping Act of 1984 ("1984 Act" or "Act"), 46 U.S.C. app. § 1709(b), provides, in pertinent part, that:

(b) Common Carriers.—No common carrier, either alone or in conjunction with any other person, directly or indirectly may—

• • • • •  
(6) Except for service contracts, engage in any unfair or unjustly discriminatory practice in the matter of—

(A) Rates;

(B) Cargo classifications;

(C) Cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage;

(D) The loading and landing of freight; or

(E) The adjustment and settlement of claims;

• • • • •  
(11) Except for service contracts, make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever;

the extension of credit to shippers of wines and spirits. (Rules Tariff No. 1, 15th Revised Page 28-A, effective October 29, 1989 and Rules Tariff No. 3, 8th Revised Page 31-A, effective October 29, 1989). Upon being advised of the objection of the Commission's staff to this provision, Sea-Land (through independent action) removed it from the Rules Tariffs and caused SEUSA to publish, for Sea-Land's account only, exceptions to individual rate items in SEUSA rate tariffs. The other carrier named in this Order has joined (through independent action) the Sea-Land exceptions to provide for the extension of credit to specific commodity groups or has published exceptions to individual rates of its own.

<sup>5</sup> This provision, or a provision to this effect, appears as a notation to the rate for each of the commodity rate items identified in Appendix A hereto. While it is recognized that because of the extensive nature of the SEUSA tariffs Appendix A may not be totally comprehensive, it is the intention of this proceeding to determine the lawfulness of this type of credit extension wherever it may appear in the tariffs and also includes any and all resiliencies of such tariff items. Compania Transatlantica Espanola, S.A. ("CTE"), although shown as a participating carrier in certain of the rate items listed Appendix A, is not named as a Respondent in this proceeding because it has indicated that it has, or will, by February 13, 1990, discontinue its participation in the credit provisions at issue in these tariffs.

(12) Subject any particular person, locality or description of traffic to an unreasonable refusal to deal or any undue or unreasonable prejudice or disadvantage in any respect whatsoever;

\* \* \* \* \*

It appears that the above-identified credit provision, by extending credit privileges to certain shippers and consignees to the exclusion of others, constitutes the giving of undue or unreasonable preference and advantage to one class of shippers or description of traffic, and, in so doing, subjects other classes of shippers or descriptions of traffic to undue or unreasonable prejudice or disadvantage in violation of sections 10(b)(11) and (12) of the 1984 Act. For the same reasons, these credit provisions may also constitute an unfair or unjustly discriminatory practice as contemplated by section 10(b)(6) of the 1984 Act.

*Now therefore, It is Ordered That* pursuant to section 11 of the 1984 Act, 46 U.S.C. app. § 1710, Carriers show cause why the extension of credit privileges to certain shippers, as identified in each of the rate items listed in Appendix A hereto and any and all reissuances thereof, should not be found to be in violation of sections 10(b)(6), 10(b)(11) and/or 10(b)(12) of the 1984 Act as unreasonably preferential, prejudicial, disadvantageous or discriminatory, in any respect whatsoever, and, if found to be in violation, why these violative provisions should not be stricken from the tariffs;

*It is further ordered, That if it is determined that Carriers violated sections 10(b)(6), 10(b)(11) or 10(b)(12) of the Act, the Commission, pursuant to section 12 of the 1984 Act, may refer this matter to an Administrative Law Judge for an appropriate proceeding to determine whether penalties should be assessed and, if so, the level of such penalties;*

*It is further ordered, That this proceeding is limited to the submission of affidavits of fact and memoranda of law;*

*It is further ordered, That any person having an interest and desiring to intervene in this proceeding shall file a petition for leave to intervene in accordance with Rule 72 of the Commission's Rules of Practice and Procedure, 46 CFR 502.72. Such petition shall be filed no later than March 29, 1990, for intervenors in support of the Carrier credit extension tariff notations and no later than April 30, 1990, for intervenors in opposition thereto.*

*It is further ordered, That Sea-Land and Nedlloyd are named Respondents in this proceeding. Affidavits of fact and memoranda of law shall be filed by*

Respondents and any intervenors in support of the credit provisions at issue, no later than March 29, 1990;

*It is further ordered, That the Commission's Bureau of Hearing Counsel be made a party to this proceeding;*

*It is further ordered, That reply affidavits and memoranda of law shall be filed by the Bureau of Hearing Counsel and any intervenors in opposition to the credit provisions at issue, no later than April 30, 1990;*

*It is further ordered, That rebuttal affidavits and memoranda of law, if any, shall be filed by Respondents and intervenors in support no later than May 15, 1990;*

*It is further ordered, That:*

(a) Should any party believe that an evidentiary hearing is required, that party must submit a request for such hearing together with a statement setting forth in detail the facts to be proved, the relevance of those facts to the issues in this proceeding, a description of the evidence which would be adduced, and why such evidence cannot be submitted by affidavit;

(b) Should any party believe that an oral argument is required, that party must submit a request specifying the reasons therefore and why argument by memorandum is inadequate to present the party's case; and

(c) Any such request for evidentiary hearing or oral argument shall be filed no later than May 25, 1990;

*It is further ordered, That notice of this Order to Show Cause be published in the Federal Register, and that a copy thereof be served upon Respondents;*

*It is further ordered, That all documents submitted by any party of record in the proceeding shall be directed to the Secretary, Federal Maritime Commission, Washington, DC 20573, in accordance with Rule 118 of the Commission's Rules of Practice and Procedure, 46 CFR 502.118, and shall be served on parties of record;*

*It is further ordered, That pursuant to Rule 61 of the Commission's Rules of Practice and Procedure, 46 CFR 502.61, the final decision of the Commission shall be issued by September 25, 1990.*

By the Commission,

Joseph C. Polking,

Secretary.

#### APPENDIX A

#### APPENDIX A—Continued

Seusa Tariff FMC No.	Page No.	Item No.	Effective date
8	25th Rev 58.....		01 Feb 90
8	28th Rev 158.....	0098.0400 0098.0401	01 Feb 90
8	40th Rev 208.....	0112.1000 .2000	01 Feb 90
8	67th Rev 242.....	0112.1000 .1000	01 Feb 90
8	38th Rev 245A.....		01 Feb 90
8	18th Rev 257.....		01 Feb 90
8	5th Rev 259.....	0112.2000	01 Feb 90
8	28th Rev 303.....	0112.3000	01 Feb 90
8	30th Rev 304.....	0112.1000	01 Feb 90
11	56th Rev 5.....		01 Feb 90
11	61st Rev 6.....		01 Feb 90
11	45th Rev 7.....		01 Feb 90
11	28th Rev 7A.....		01 Feb 90
11	49th Rev 75.....		01 Feb 90
11	6th Rev 92.....		01 Feb 90
11	6th Rev 93.....		01 Feb 90
11	18th Rev 115.....		01 Feb 90
15	14th Rev 62.....	0112.49000 .49010 .42010	05 Feb 90
15	15th Rev 63.....	0112.10000 .10000	05 Feb 90
15	5th Rev 65.....	0111.01000	14 Dec 89
15	27th Rev 255.....	0112.49001 .42001	05 Feb 90
15	15th Rev 256.....	0112.42011	05 Feb 90
15	8th Rev 257.....	0111.01001	14 Dec 89
15	4th Rev 258.....	0111.01001	14 Dec 89
15	24th Rev 412.....	0112.10001	02 Feb 90
15	7th Rev 417.....	0112.10001	01 Feb 90
15	10th Rev 423.....		05 Jan 90
15	12th Rev 434.....	0112.10001	05 Feb 90
16	16th Rev 13.....	0112.42003 .49003 .01003	05 Feb 90
16	14th Rev 14.....	0112.10003	05 Feb 90
16	14th Rev 15.....	0112.10003	05 Feb 90
16	13th Rev 16.....	0112.10003	05 Feb 90
16	12th Rev 17.....	0112.10003	05 Feb 90
16	16th Rev 126.....		24 Jan 90
16	14th Rev 130.....	0112.10003	27 Jan 90
16	8th Rev 131.....	0112.10003	27 Jan 90
18	9th Rev 14A.....		06 Feb 90
18	12th Rev 15.....		06 Feb 90

[FR Doc. 90-3686 Filed 2-15-90; 8:45 am]

BILLING CODE 6730-01-M

#### FEDERAL RESERVE SYSTEM

##### Yale Bancorporation; Correction

This notice corrects a previous Federal Register notice (FR Doc. 90-427) published at page 783 of the issue for Tuesday, January 9, 1990.

Under the Federal Reserve Bank of Chicago, the entry for Yale Bancorporation amended to read as follows:

1. *Yale Bancorporation, Yale, Iowa, to become a bank holding company by acquiring 96.25 percent of Farmers State Bank, Yale, Iowa. Farmers State Bank directly engages in credit-related insurance activities. Farmers State Bank also leases office space to Hemphill &*

Seusa Tariff FMC No.	Page No.	Item No.	Effective date
8	29th Rev 56.....	0112.4206 .1001 .1000	01 Feb 90

Associates, Inc., Yale, Iowa, a general insurance agency, which conducts its activities in an area of less than five thousand people.

Comments on this Application must be received by March 2, 1990.

Board of Governors of the Federal Reserve System, February 9, 1990.

Jennifer J. Johnson,

*Associate Secretary of the Board.*

[FR Doc. 90-3660 Filed 2-15-90; 8:45 am]

BILLING CODE 6210-01-M

## OFFICE OF GOVERNMENT ETHICS

### Public Information Collection Form Revision Submitted for OMB Approval

**AGENCY:** Office of Government Ethics.

**ACTION:** Notice of proposed revision of a public information collection form submitted to OMB for clearance.

**SUMMARY:** The Office of Government Ethics (OGE) has submitted to the Office of Management and Budget (OMB) for approval, in accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35), a proposed revised version of a form for reprinting during 1990, the SF 278 Financial Disclosure Report, that collects information from the public. Since the form is also a Standard Form, OGE is submitting the proposed reprint revisions to the General Services Administration for its clearance as well.

**DATES:** Comments on this proposal should be received by March 19, 1990.

**ADDRESSES:** Comments should be sent to Joseph F. Lackey, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, room 3002, Washington, DC 20503, telephone (202) FTS 395-7316.

**FOR FURTHER INFORMATION CONTACT:** William E. Gressman, Office of Government Ethics, suite 500, 1201 New York Avenue NW, Washington, DC 20005-3917, telephone (202/FTS) 523-5757, FAX (202/FTS) 523-6325. A copy of OGE's request for approval from OMB, including the proposed revised form, may be obtained by contacting Mr. Gressman.

**SUPPLEMENTARY INFORMATION:** The Office of Government Ethics (OGE), formerly part of the Office of Personnel Management (OPM), is now a separate agency in the executive branch of the United States government. OGE's separate agency status, effective October 1, 1989, was provided for in sections 3 and 10 of the OGE 1988 reauthorization legislation. Public Law 100-598, amending the Ethics in

Government Act, 5 U.S.C. Appendix IV, section 401.

One of the forms that OGE now sponsors on its own, the SF 278 Financial Disclosure Report, is used by high-level executive branch personnel for public financial reporting, upon entrance on government duty, annually and upon terminating government employment. Every year, some 12,000 to 13,000 SF 278 forms are filed. Most of the persons who complete the SF 278 are current executive branch government employees at the time they fill out the forms (those who have newly assumed executive positions, incumbents or those about to leave government). However, some filers are private citizens, either nominees, other candidates for high-level executive branch positions, or those who have just left the government (the forms are due within 30 days of departure, unless an extension of time is granted). Thus, Paperwork Reduction Act clearance is required for the SF 278. The number of non-government filers is presently estimated to be 279 a year at OGE (which reviews, along with the employing departments and agencies, the reports of all executive branch officials appointed by the President subject to Senate confirmation). The average time for response to the SF 278 form is one hour for a total annual public reporting burden at OGE of 279 hours.

The government-wide supply of the SF 278 form is running out and a reprinting will likely be needed sometime later this year, 1990. The proposed revisions of the SF 278 for the coming reprinting will: Add a public burden statement; substitute the Office of Government Ethics for OPM as the sponsoring agency will indicate the OMB/OGE form clearance number; update various statutory and regulation citation on the form (the old OPM 5 CFR part 734 financial disclosure regulations are now codified at new OGE part 2634 of 5 CFR); correct a couple of typographical errors; and change the edition date to 1/90 as well as add a January 1, 1991 expiration date (the previous 1/87 revised edition of the SF 278 will continue to be usable for the remainder of 1990). Since the SF 278 (and the supplemental Schedule A sheet) is a Standard Form, OGE will also submit the proposed reprint revisions to the General Services Administration (GSA) for its clearance.

The currently proposed SF 278 reprint revisions are based on the Old Ethics in Government Act title II, section 202 (5 U.S.C. appendix III) executive branch reporting standards prior to amendment by the Ethics Reform Act of 1989 (Pub. L. 101-194, 103 Stat. 1716-1783). Although

the reform act repealed old Ethics Act title II effective January 1, 1990, proposed technical amendments to restore the effectiveness of the prior provisions for the remainder of calendar year 1990 are presently under consideration. The new consolidated financial disclosure provisions of title I of the Ethics Act, as amended by the Ethics Reform Act, will not apply to any reports filed prior to January 2, 1991 (the new access and fine sections, however, are currently effective and are reflected in the proposed reprint revisions). OGE is also working on a future financial reporting form to effectuate the new title I provisions and will submit that form for OMB and GSA clearance in due course. Meanwhile, the current SF 278 form and the 1990 reprint will continue to serve for the rest of 1990 as the public financial reporting form for executive branch officials.

Approved: February 12, 1990.

Donald E. Campbell,

*Acting Director, Office of Government Ethics.*

[FR Doc. 90-3688 Filed 2-15-90; 8:45 am]

BILLING CODE 6345-01-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Office of the Secretary

#### Annual Update of the Poverty Income Guidelines

**AGENCY:** Department of Health and Human Services.

**ACTION:** Notice.

**SUMMARY:** This notice provides an update of the poverty income guidelines to account for last year's increase in prices as measured by the Consumer Price Index.

**DATES:** February 16, 1990.

**ADDRESSES:** Office of the Assistant Secretary for Planning and Evaluation, Department of Health and Human Services, Washington, DC 20201.

**FOR FURTHER INFORMATION CONTACT:** For information about the poverty income guidelines in general, contact Joan Turek-Brezina or Gordon Fisher (telephone: (202) 245-8141).

*Questions about applying these guidelines to a particular Federal program should be referred to the Federal office which is responsible for that program.*

*For information about the Hill-Burton Uncompensated Services Program (no-fee or reduced-fee hospital care at certain hospitals for certain persons unable to pay for such care), contact the*

Office of the Director, Division of Facilities Compliance (telephone: (301) 443-6512). (As set by 42 CFR 124.505(b), the effective date of these guidelines for facilities obligated under the Hill-Burton Uncompensated Services Program is 80 days from the date of this publication.)

*For information about the number of persons in poverty or about the Census Bureau (statistical) poverty thresholds, contact Enrique Lamas, Chief, Poverty and Wealth Statistics Branch, U.S. Bureau of the Census (telephone: (301) 763-8578).*

This notice provides the 1990 update of the poverty income guidelines required by sections 652 and 673(2) of the Omnibus Budget Reconciliation Act of 1981 (Pub. L. 97-35). Section 673(2) (42 U.S.C. 9902(2)) requires the use of the poverty guidelines as an eligibility criterion for the Community Services Block Grant program, while section 652 (42 U.S.C. 9847) requires the use of the poverty guidelines as an eligibility criterion for the Head Start program. As required by the law, this update reflects last year's change in the Consumer Price Index (CPI-U); it was done using the same procedure used in previous years.

These poverty income guidelines are used as an eligibility criterion by a number of Federal programs. The guidelines are a simplified version of the Federal Government's statistical poverty thresholds used by the Bureau of the Census to prepare its statistical estimates of the number of persons and families in poverty. The poverty income guidelines issued by the Department of Health and Human Services (formerly by the Community Services Administration) are used for administrative purposes—for instance, for determining whether a person or family is financially eligible for assistance or services under a particular Federal program. The poverty thresholds are used primarily for statistical purposes.

In certain cases, as noted in the relevant authorizing legislation or program regulations, a program uses the poverty income guidelines as only one of several eligibility criteria, or uses a percentage multiple of the guidelines (for example, 130 percent or 185 percent of the guidelines). Some other programs, while not using the guidelines as a criterion of individual eligibility, use them for the purpose of giving priority to lower-income persons or families in the provision of assistance or services. In some cases, these poverty income guidelines may not become effective for a particular program until a regulation or notice specifically applying to the program in question has been issued.

The poverty guidelines given below should be used for both farm and nonfarm families.

The following definitions (derived for the most part from language used in U.S. Bureau of the Census, Current Population Reports, Series P-60, No. 163 and earlier reports in the same series) are made available for use in connection with the poverty income guidelines. Some Federal programs may use definitions that differ somewhat from those given below. Similarly, non-Federal organization which use the poverty guidelines in non-Federally-funded activities sometime use different definitions from those given below. In either case, the precise definitions used may be determined by consulting the office or organization administering the program in question.

(a) *Family.* A family is a group of two or more persons related by birth, marriage, or adoption who live together; all such related persons are considered as members of one family. For instance, if an older married couple, their daughter and her husband and two children, and the older couple's nephew all lived in the same house or apartment, they would all be considered members of a single family. If a household includes more than one family and/or more than one unrelated individual, the poverty guidelines are applied separately to each family and/or unrelated individual, and not to the household as a whole.

(b) *Family unit of size one.* In connection with the poverty income guidelines, a family unit of size one is an unrelated individual (as defined by the Census Bureau)—that is, a person 15 years old or over (other than an inmate of an institution) who is not living with any relatives. An unrelated individual may be the only person living in a housing unit, or may be living in a housing unit (or in group quarters such as a rooming house) in which one or more persons also live who are not related to the individual in question by birth, marriage, or adoption. (Examples of unrelated individuals residing with others include a lodger, a foster child, a ward, or an employee.)

(c) *Income.* This means total annual cash receipts before taxes from all sources, with the exceptions noted below. Income data for a part of a year may be annualized in order to determine eligibility—for instance, by multiplying by four the amount of income received during the most recent three months. Income includes money wages and salaries before any deductions; net receipts from nonfarm self-employment (receipts from a person's own

unincorporated business, professional enterprise, or partnership, after deductions for business expenses); net receipts from farm self-employment (receipts from a farm which one operates as an owner, renter, or sharecropper, after deductions for farm operating expenses); regular payments from social security, railroad retirement, unemployment compensation, strike benefits from union funds, workers' compensation, veterans' payments, public assistance (including Aid to Families with Dependent Children, Supplemental Security Income, Emergency Assistance money payments, and non-Federally-funded General Assistance or General Relief money payments), and training stipends; alimony, child support, and military family allotments or other regular support from an absent family member or someone not living in the household; private pensions, government employee pensions (including military retirement pay), and regular insurance or annuity payments; college or university scholarships, grants, fellowships, and assistantships; and dividends, interest, net rental income, net royalties, periodic receipts from estates or trusts, and net gambling or lottery winnings.

A defined here, income does not include the following types of money received: capital gains; any assets drawn down as withdrawals from a bank, the sale of property, a house, or a car; tax refunds, gifts, loans, lump-sum inheritances, one-time insurance payments, or compensation for injury. Also excluded are noncash benefits, such as the employer-paid or union-paid portion of health insurance or other employee fringe benefits, food or housing received in lieu of wages, the value of food and fuel produced and consumed on farms, the imputed value of rent from owner-occupied nonfarm or farm housing, and such Federal noncash benefit programs as Medicare, Medicaid, food stamps, school lunches, and housing assistance.

#### 1990 Poverty Income Guidelines for All States (Except Alaska and Hawaii) and the District of Columbia

Size of family unit	Poverty guideline
1	\$6,280
2	8,420
3	10,560
4	12,700
5	14,840
6	16,980
7	19,120
8	21,260

For family units with more than 8 members, add \$2,140 for each additional member.

#### Poverty Income Guidelines for Alaska

Size of family unit	Poverty guideline
1	\$7,840
2	10,520
3	13,200
4	15,880
5	18,560
6	21,240
7	23,920
8	26,600

For family units with more than 8 members, add \$2,680 for each additional member.

#### Poverty Income Guidelines for Hawaii

Size of family unit	Poverty guideline
1	\$7,230
2	9,690
3	12,150
4	14,610
5	17,070
6	19,530
7	21,990
8	24,450

For family units with more than 8 members, add \$2,460 for each additional member.

Dated: February 12, 1990.

Louis W. Sullivan,

Secretary of Health and Human Services.

[FR Doc. 90-3706 Filed 2-15-90; 8:45 am]

BILLING CODE 4150-04-M

#### Health Resources and Services Administration

#### Rural Health Research Centers; Acceptance of Grant Applications

**AGENCY:** Health Resources and Services Administration, Public Health Service, DHHS.

**ACTION:** Notice of availability of funds.

**SUMMARY:** The Office of Rural Health Policy, Health Resources and Services Administration (HRSA), announces that applications are being accepted for grants to initiate two new Rural Health Research Centers. These centers will collect, analyze, and disseminate current information on rural health and will conduct policy relevant research and analyses of rural health issues of national significance. One center will have a principal emphasis on the health problems of rural minorities. Awards will be made from funds appropriated

under Public Law 101-166 (the Appropriations bill for FY 90). It is anticipated that approximately \$500,000 will be available to support both of these grants.

**DATES:** To receive consideration, applications must be received by the close of business, on April 30, 1990, by the Grants Management Officer at the address below.

Applications shall be considered as meeting the deadline if they are either (1) received on or before the deadline date; or (2) postmarked on or before the deadline date and received in time for submission to the review committee. A legibly dated receipt from a commercial carrier or U.S. Postal Service will be accepted in lieu of a postmark. Private metered postmarks will not be acceptable as proof of timely mailing. Applications not meeting the deadline will be returned to the applicant.

**ADDRESSES:** Requests for grant application packages should be addressed to: Paul T. Clark, Grants and Audit Resolution Branch, Division of Grants and Procurement Management, Room 13A-27, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857, telephone: (301) 443-2720.

**FOR FURTHER INFORMATION CONTACT:** Requests for technical or programmatic information should be directed to Arlene Granderson, Office of Rural Health Policy, Room 14-22, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20957, telephone: (301) 443-0835.

The Standard application form and general instructions for competing applications, Form PHS 398 Public Health Service Grant, (OMB No. 0925-0001) have been approved by the Office of Management and Budget.

#### SUPPLEMENTARY INFORMATION:

##### Program Objectives

This notice announces support for the development of two new Rural Health Research Centers. Five such centers are currently being funded by the Department of Health and Human Services, Health Resources and Services Administration. Within the limits of their resources, all of the Rural Health Research Centers will, as their two most important activities: (1) Conduct applied research, case studies, and policy-relevant analyses that focus on the delivery, financing, organization, and management of health care services in rural areas, and (2) widely disseminate the results of their efforts. Centers also will: (3) collect, develop, analyze, and disseminate current data/information on

rural health, and (4) conduct additional rural health activities with financial support from foundations and/or other public and private entities interested in rural research and demonstration activities.

#### Eligible Applicants

All public and private entities, both non-profit and for-profit, are eligible to apply. Current Rural Health Research Center grantees are not eligible to compete for these grant awards since both the Senate and House Appropriations reports indicate that additional funding is for "new" centers.

#### Review Criteria

We will evaluate grant applications on the basis of the following criteria:

- (1) The extent to which project objectives are specific, measurable, realistic, and consistent with the program objectives defined above;
  - (2) The quality of the applicant's plan for coordinating project activities;
  - (3) The degree to which the applicant demonstrates special expertise in rural health analysis;
  - (4) The extent to which the project personnel are qualified for the work required and the applicant organization has adequate facilities and personnel available;
  - (5) That the project includes a strong evaluation component;
  - (6) That the project will widely and effectively disseminate the results of its efforts;
  - (7) The degree to which the applicant shows evidence of non-Federal financial support for the proposed project activities, both during the project period and after Federal funding is completed; and
  - (8) In the case of applicants for the research center that will have a principal emphasis on the health problems of rural minorities, the extent to which the applicant demonstrates special expertise and experience in analysis of rural minority populations, their health problems and programs that serve them.
- Executive Order 12372**
- The Rural Health Research Centers Grant Program has been determined to be a program which is not subject to the provisions of Executive Order 12372 concerning intergovernmental review of Federal programs.

(The OMB Catalog of Federal Domestic Assistance number is 13.155)

Dated: January 22, 1990.

John H. Kelso,  
Acting Administrator.

[FR Doc. 90-3694 Filed 2-15-90; 8:45 am]

BILLING CODE 4160-15-M

### Social Security Administration

#### Agency Forms Submitted to the Office of Management and Budget for Clearance

Each Friday the Social Security Administration publishes a list of information collection packages that have been submitted to the Office of Management and Budget (OMB) for clearance in compliance with Public Law 96-511, The Paperwork Reduction Act. The following clearance packages have been submitted to OMB since the last list was published in the Federal Register on February 2, 1990.

Call Reports Clearance Officer on (301) 965-4149 for copies of package.

1. Annual Earnings Operation Direct Mail Followup Program —0960-0369— The information collected on forms SSA-L9778, 9779, 9780 and 9781 is used by the Social Security Administration to determine if the recipients have underestimated their earnings for the current year. The affected public is comprised of six groups of beneficiaries who are most likely to be overpaid because of underestimating or non-reporting of earnings.

Number of Respondents: 400,000

Frequency of Response: 1

Average Burden Per Response: 10 minutes

Estimated Annual Burden: 66,667 hours

OMB Desk Officer: Justin Kopca

Written comments and recommendations regarding these information collections should be sent directly to the appropriate OMB Desk Officer designated above at the following address: OMB Reports Management Branch, New Executive Office Building, Room 3208, Washington, DC 20503.

Dated: February 8, 1990.

Ron Compston,  
Social Security Administration, Reports Clearance Officer.

[FR Doc. 90-3581 Filed 2-15-90; 8:45 am]

BILLING CODE 4190-11-M

### DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

#### Office of the Assistant Secretary for Community Planning and Development

[Docket No. N-90-1917; FR-2605-N-59]

#### Notice of Underutilized and Unutilized Federal Buildings and Real Property Determined by HUD To Be Suitable for Use for Facilities To Assist the Homeless

**AGENCY:** Office of the Assistant Secretary for Community Planning and Development, HUD.

**ACTION:** Notice.

**SUMMARY:** This Notice identifies underutilized and unutilized federal property determined by HUD to be suitable for possible use for facilities to assist the homeless.

**EFFECTIVE DATE:** February 16, 1990.

**ADDRESS:** For further information, contact James Forsberg, Room 7262, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410; telephone (202) 755-6300; TDD number for the hearing- and speech-impaired (202) 755-5965. (These telephone numbers are not toll-free.)

**SUPPLEMENTARY INFORMATION:** In accordance with the December 12, 1988 Court Order in *National Coalition for the Homeless v. Veterans Administration*, No. 88-2503-OG

(D.D.C.), HUD is publishing this Notice to identify Federal buildings and real property that HUD has determined are suitable for use for facilities to assist the homeless. The properties were identified from information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal property.

The Order requires HUD to take certain steps to implement section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411), which sets out a process by which unutilized Federal properties may be made available to the homeless. Under section 501(a), HUD is to collect information from Federal landholding agencies about such properties and then to determine, under criteria developed in consultation with the Department of Health and Human Services (HHS) and the Administrator of General Services (GSA), which of those properties are suitable for facilities to assist the homeless. The Order requires HUD to

publish, on a weekly basis, a Notice in the Federal Register identifying the properties determined as suitable.

The properties identified in this Notice may ultimately be available for use by the homeless, but they are first subject to review by the landholding agencies pursuant to the court's Memorandum of December 14, 1988 and section 501(b) of the McKinney Act. Section 501(b) requires HUD to notify each Federal agency about any property of such agency that has been identified as suitable. Within 30 days from receipt of such notice from HUD, the agency must transmit to HUD: (1) Its intention to declare the property excess to the agency's need or to make the property available on an interim basis for use as facilities to assist the homeless; or (2) a statement of the reasons that the property cannot be declared excess or made available on an interim basis for use as facilities to assist the homeless.

First, if the landholding agency decides that the property cannot be declared excess or made available to the homeless for use on an interim basis the property will no longer be available.

Second, if the landholding agency declares the property excess to the agency's need, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law and the December 12, 1988 Order and December 14, 1988 Memorandum, subject to screening for other Federal use.

Homeless assistance providers interested in any property identified as suitable in this Notice should send a written expression of interest to HHS, addressed to Judy Breitman, Division of Health Facilities Planning, U.S. Public Health Service, HHS, Room 17A-10, 5600 Fishers Lane, Rockville, MD 20857; (301) 443-2265. (This is not a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit written expressions of interest within 30 days from the date of this Notice. For complete details concerning the timing and processing of applications, the reader is encouraged to refer to HUD's Federal Register Notice on June 23, 1989 (54 FR 26421), as corrected on July 3, 1989 (54 FR 27975).

For more information regarding particular properties identified in this Notice (i.e., acreage, floor plan, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following

addresses: U.S. Army: HQ-DA, Attn: DAEN-ZCI-P-Robert Conte; Room 1E871 Pentagon, Washington, DC 20360-2600, (202) 693-4583; U.S. Navy: John Carr, Code 20 YAW, Naval Facilities Engineering Command, 200 Stovall Street, Alexandria, VA 22332, (202) 325-0474; GSA: James Foliard, Federal Property Resources Services, GSA, 18th and F Streets NW., Washington, DC 20405, (202) 535-7067.

Dated: February 8, 1990.

**Paul Roitman Bardack,**  
Deputy Assistant Secretary for Program Policy Development and Evaluation.

#### Suitable Land (By State)

##### Guam

Glup APRA Harbor Parcel 7  
Portion of Lot 238-1 (Tract 411)  
Santa Rita, GU  
Location: Route runs along the western boundary of the property  
Landholding Agency: GSA  
Property Number: 549010002  
Status: Excess  
Comment: 73.49 acres; portion in Namo River flood plain; portions also located in wetlands  
GSA NO. 9-N-GU-420A  
Naucams Westpac Parcel 1N  
Barrigada, GU  
Location: Route 15 within radio barrigada Area B  
Landholding Agency: GSA  
Property Number: 549010003  
Status: Excess  
Comment: 61.450 acres; potential utilities  
GSA NO. 9-N-CU-421C  
Glup APRA Harbor Parcel 8A  
Santa Rita, GU  
Location: Portion of Lots 238-1 and 402  
Landholding Agency: GSA  
Property Number: 549010004  
Status: Excess  
Comment: 44+ acres; large portion leased by government of Guam; abuts Pale Fernina Road  
GSA NO. 9-N-GU-420A  
Annex No. 2  
Parcel IAF/Portion Andersen AFB Communications  
Barrigada, GU  
Location: Located off of Route 15  
Landholding Agency: GSA  
Property Number: 549010005  
Status: Excess  
Comment: 252.63 acres; 160 of which is forest like; rolling terrain with sink holes in south central portion  
GSA NO. 9-D-GU-430A

##### Hawaii

Camp H. M. Smith (USMC)  
Oahu (Hawaii)  
Halawa Heights, HI Co: Honolulu

Location: Land is located on perimeter of base  
Landholding Agency: Navy  
Property Number: 779010062  
Status: Excess  
Comment: 13 acres; perimeter and buffer land; most recent use—buffer; 75%—80% of land is steep hillside and undeveloped

##### Illinois

Libertyville Training Site  
Libertyville, IL Co: Luke  
Landholding Agency: Navy  
Property Number: 779010073  
Status: Excess  
Comment: 114 acres; possible radiation hazard; existing FAA use license

##### Maryland

White Oak Lab  
Navy Surface Warfare Center  
10901 New Hampshire Avenue  
Silver Spring, MD Co: Prince Georges  
Landholding Agency: Navy  
Property Number: 779010066  
Status: Excess  
Comment: 16.5 acres; most recent use—buffer; secure area—access can be provided by relocation of fences

##### Tennessee

Milan Army Ammunition Plant  
Milan, TN Co: Carroll  
Location: Plant boundary in the northeast corner of the plant & housing area  
Landholding Agency: Army  
Property Number: 219010547  
Status: Excess  
Comment: 17.2 acres; right of entry legal constraint

##### Washington

301E, A104E  
Nike Vashon Easements  
Vashon, WA Co: King  
Location: South of the community of Vashon  
Landholding Agency: GSA  
Property Number: 549010001  
Status: Surplus  
Comment: Suitable Airspace; No government owned land; easement, missile tracking airspace  
GSA NO. D-WASH-562A

#### Suitable Buildings (By State)

##### Kentucky

Bldg. 104  
Fort Campbell, KY Co: Christian  
Landholding Agency: Army  
Property Number: 219010937  
Status: Underutilized

Comment: 15,066 sq. ft.; two story; possible asbestos; most recent use—barracks

##### Bldg. 126

Fort Campbell

Fort Campbell, KY Co: Christian  
Landholding Agency: Army  
Property Number: 219010938  
Status: Underutilized  
Comment: 12,576 sq. ft.; two story; possible asbestos; most recent use—storage

##### Bldg. 122

Fort Campbell

Fort Campbell, KY Co: Christian  
Landholding Agency: Army  
Property Number: 219010939  
Status: Underutilized  
Comment: 1,438 sq. ft.; two story; possible asbestos; most recent use—storage and administration

##### Bldg. 141

Fort Campbell  
Fort Campbell, KY Co: Christian  
Landholding Agency: Army  
Property Number: 219010940  
Status: Underutilized  
Comment: 12,576 sq. ft.; two story; possible asbestos; most recent use—administration

##### Bldg. 147

Fort Campbell  
Fort Campbell, KY Co: Christian  
Landholding Agency: Army  
Property Number: 219010941  
Status: Underutilized  
Comment: 12,576 sq. ft.; two story; possible asbestos; most recent use—storage

##### Bldg. 149

Fort Campbell  
Fort Campbell, KY Co: Christian  
Landholding Agency: Army  
Property Number: 219010942  
Status: Underutilized  
Comment: 12,576 sq. ft.; two story; possible asbestos; most recent use—storage

##### Bldg. 161

Fort Campbell  
Fort Campbell, KY Co: Christian  
Landholding Agency: Army  
Property Number: 219010943  
Status: Unutilized  
Comment: 12,576 sq. ft.; two story; possible asbestos; most recent use—Elementary School

##### Bldg. 165

Fort Campbell  
Fort Campbell, KY Co: Christian  
Landholding Agency: Army  
Property Number: 219010944  
Status: Underutilized  
Comment: 12,576 sq. ft.; two story; possible asbestos; most recent use—storage

##### Bldg. 167

Fort Campbell  
Fort Campbell, KY Co: Christian  
Landholding Agency: Army  
Property Number: 219010945  
Status: Underutilized

Comment: 12,576 sq. ft.; two story; possible asbestos; most recent use—storage  
**Bldg. 169**  
 Fort Campbell  
 Fort Campbell, KY Co: Christian  
 Landholding Agency: Army  
 Property Number: 219010946  
 Status: Underutilized  
 Comment: 12,576 sq. ft.; two story; possible asbestos; most recent use—storage and administration  
**Bldg. 2244**  
 Fort Campbell  
 Fort Campbell, KY Co: Christian  
 Landholding Agency: Army  
 Property Number: 219010948  
 Status: Underutilized  
 Comment: 4,248 sq. ft.; possible asbestos; two story; most recent use—storage  
**Bldg. 3110**  
 Fort Campbell  
 Fort Campbell, KY Co: Christian  
 Landholding Agency: Army  
 Property Number: 219010950  
 Status: Unutilized  
 Comment: 1,000 sq. ft.; one story; possible asbestos; most recent use—administration  
**Bldg. 5954**  
 Fort Campbell  
 Fort Campbell, KY Co: Christian  
 Landholding Agency: Army  
 Property Number: 219010953  
 Status: Unutilized  
 Comment: 2,179 sq. ft.; one story; possible asbestos; most recent use—Military Vehicle Maintenance Shop, Organizational  
**Bldg. 5956**  
 Fort Campbell  
 Fort Campbell, KY Co: Christian  
 Landholding Agency: Army  
 Property Number: 219010956  
 Status: Unutilized  
 Comment: 2,179 sq. ft.; one story; possible asbestos; most recent use—Military Vehicle Maintenance Shop; Organizational  
**Bldg. 5958**  
 Fort Campbell  
 Fort Campbell, KY Co: Christian  
 Landholding Agency: Army  
 Property Number: 219010958  
 Status: Unutilized  
 Comment: 2,179 sq. ft.; one story; possible asbestos; most recent use—Military Maintenance Shop, Organizational  
**Bldg. 5960**  
 Fort Campbell  
 Fort Campbell, KY Co: Christian  
 Landholding Agency: Army  
 Property Number: 219010961  
 Status: Unutilized  
 Comment: 2,179 sq. ft.; one story; possible asbestos; most recent use—

Military Vehicle Maintenance Shop, Organizational  
**Bldg. A6306**  
 Fort Campbell  
 Fort Campbell, KY Co: Christian  
 Landholding Agency: Army  
 Property Number: 219010965  
 Status: Unutilized  
 Comment: 2,487 sq. ft.; one story; possible asbestos; most recent use—Military Vehicle Maintenance Shop, Organizational  
**Bldg. 6605**  
 Fort Campbell  
 Fort Campbell, KY Co: Christian  
 Landholding Agency: Army  
 Property Number: 219010968  
 Status: Underutilized  
 Comment: 1,968 sq. ft.; one story; most recent use—storage  
**New Jersey**  
 Naval Reserve Center  
 Trenton & Merselis Avenues  
 Clifton, NJ Co: Passaic  
 Landholding Agency: Navy  
 Property Number: 779010026  
 Status: Excess  
 Comment: 18,000 sq. ft.; 1 floor; most recent use—offices; needs rehab  
**New York**  
 Naval Reserve Center  
 112 Hanse Avenue  
 Freeport, NY Co: Nassau  
 Landholding Agency: Navy  
 Property Number: 779010041  
 Status: Excess  
 Comment: 40,000 sq. ft.; 1 floor; most recent use—offices; needs rehab.  
**Ohio**  
 Naval & Marine Corps Res. Ctr.  
 170 Ashland Road  
 Mansfield, OH Co: Richland  
 Landholding Agency: Navy  
 Property Number: 779010075  
 Status: Excess  
 Comment: 2,900 sq. ft.; 1 floor; most recent use—offices; needs rehab.; Navy owns bldg.—land leased from city; expires September 1990.  
**Oklahoma**  
**Bldg. T-313**  
 Fort Sill  
 313 Knox Road  
 Lawton, OK Co: Comanche  
 Landholding Agency: Army  
 Property Number: 219011235  
 Status: Unutilized  
 Comment: 1,640 sq. ft.; wood frame; one floor; most recent use—storehouse  
**Bldg. T-826**  
 Fort Sill  
 826 Macomb Road  
 Lawton, OK Co: Comanche  
 Landholding Agency: Army  
 Property Number: 219011239  
 Status: Unutilized  
 Comment: 5,174 sq. ft.; structurally unsound; wood frame; 1 floor asbestos; WWII Bldg.  
**Bldg. T-931**  
 Fort Sill  
 931 Fort Sill Blvd.  
 Lawton, OK Co: Comanche  
 Landholding Agency: Army  
 Property Number: 219011239  
 Status: Unutilized  
 Comment: 1,976 sq. ft.; structurally unsound; asbestos; wood frame; 2 floors, WWII Bldg.  
**Bldg. T-1471**  
 Fort Sill  
 1471 Bateman Road  
 Lawton, OK Co: Comanche  
 Landholding Agency: Army  
 Property Number: 219011241  
 Status: Unutilized  
 Comment: 468 sq. ft.; structurally unsound; wood frame; 1 floor; WWII Bldg.  
**Bldg. T-2530**  
 Fort Sill  
 2530 Sheridan Road  
 Lawton, OK Co: Comanche  
 Landholding Agency: Army  
 Property Number: 219011246  
 Status: Unutilized  
 Comment: 3,988 sq. ft.; structurally unsound; asbestos; wood frame; 2 floors, WWII Bldg.  
**Bldg. T-2531**  
 Fort Sill  
 2531 Sheridan Road  
 Lawton, OK Co: Comanche  
 Landholding Agency: Army  
 Property Number: 219011248  
 Status: Unutilized  
 Comment: 1,990 sq. ft.; structurally unsound; asbestos; wood frame, 2 floors, WWII Bldg.  
**Bldg. T-2532**  
 Fort Sill  
 2532 Sheridan Road  
 Lawton, OK Co: Comanche  
 Landholding Agency: Army  
 Property Number: 219011250  
 Status: Unutilized  
 Comment: 1,990 sq. ft.; structurally unsound; asbestos; wood frame; 2 floors, WWII Bldg.  
**Bldg. T-2533**  
 Fort Sill  
 2533 Sheridan Road  
 Lawton, OK Co: Comanche  
 Landholding Agency: Army  
 Property Number: 219011252  
 Status: Unutilized  
 Comment: 1,976 sq. ft.; structurally unsound; asbestos; wood frame; 2 floors, WWII Bldg.  
**Bldg. T-2544**

- Fort Sill  
2544 Sheridan Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011253  
Status: Unutilized  
Comment: 1,994 sq. ft.; asbestos; wood frame; 2 floors, No operating sanitary facilities; most recent use—barracks  
Bldg. T-2545  
Fort Sill  
2545 Sheridan Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011255  
Status: Unutilized  
Comment: 1,994 sq. ft.; asbestos; wood frame; 2 floors; No operating sanitary facilities; most recent use—enl. barracks basic  
Bldg. T-2546  
Fort Sill  
2546 Sheridan Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011257  
Status: Unutilized  
Comment: 1,994 sq. ft.; asbestos; wood frame; 2 floors; no operating sanitary facilities, most recent use—enl. barracks basic  
Bldg. T-2547  
Fort Sill  
2547 Sheridan Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011258  
Status: Unutilized  
Comment: 1,994 sq. ft.; asbestos; wood frame; 2 floor; no operating sanitary facilities; most recent use—enl. barracks basic  
Bldg. T-2548  
Fort Sill  
2548 Sheridan Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011260  
Status: Unutilized  
Comment: 1,994 sq. ft.; asbestos; wood frame; 2 floors; no operating sanitary facilities; most recent use—enl. barracks basic  
Bldg. T-2549  
Fort Sill  
2549 Sheridan Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011261  
Status: Unutilized  
Comment: 1,110 sq. ft.; asbestos; wood frame; 1 floor; No operating sanitary facilities; most recent use—administrative  
Bldg. T-2551  
Fort Sill  
2551 Currie Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011262  
Status: Unutilized  
Comment: 1,116 sq. ft.; asbestos; wood frame; 1 floor; No operating sanitary facilities; most recent use—  
Bldg. T-2564  
Fort Sill  
2564 Currie Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011264  
Status: Unutilized  
Comment: 1,165 sq. ft.; asbestos; wood frame; 1 floor; most recent use—  
Bldg. T-2565  
Fort Sill  
2565 Currie Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011266  
Status: Unutilized  
Comment: 1,196 sq. ft.; asbestos; wood frame; 1 floor; most recent use—  
Bldg. T-2566  
Fort Sill  
2566 Currie Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011267  
Status: Unutilized  
Comment: 1,179 sq. ft.; asbestos; wood frame; 1 floor; most recent use—  
Bldg. T-2567  
Fort Sill  
2567 Currie Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011269  
Status: Unutilized  
Comment: 1,186 sq. ft.; structurally unsound but capable of repair; wood frame; 1 floor  
Bldg. T-2568  
Fort Sill  
2568 Currie Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011271  
Status: Unutilized  
Comment: 1,205 sq. ft.; structurally unsound but capable of repair; wood frame; 1 floor  
Bldg. T-2601  
Fort Sill  
2601 Ringold Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011272  
Status: Unutilized  
Comment: 1,600 sq. ft.; 2 story wood frame; possible asbestos; possible structure deficiencies  
Bldg. T-2606  
Fort Sill  
2606 Currie Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011273  
Status: Unutilized  
Comment: 2,722 sq. ft.; possible asbestos; one floor wood frame; most recent use—Headquarters Bldg  
Bldg. T-2611  
Fort Sill  
2611 Miner Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011274  
Status: Unutilized  
Comment: 2,361 sq. ft.; 2 floors, wood frame; most recent use—  
Bldg. T-2613  
Fort Sill  
2613 Ringold Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011276  
Status: Unutilized  
Comment: 4,800 sq. ft.; possible asbestos; wood frame; 2 floors; most recent use—barracks  
Bldg. T-2614  
Fort Sill  
2614 Ringold Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011278  
Status: Unutilized  
Comment: 3,778 sq. ft.; possible asbestos; wood frame; two floors; most recent use—barracks  
Bldg. T-2615  
Fort Sill  
2615 Ringold Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011279  
Status: Unutilized  
Comment: 3,778 sq. ft.; possible asbestos; wood frame; 2 floors; most recent use—barracks  
Bldg. T-2620  
Fort Sill  
2620 Ringold Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011281  
Status: Unutilized  
Comment: 2,370 sq. ft.; 2 story wood frame; possible asbestos; possible structure deficiencies  
Bldg. T-2621  
Fort Sill  
2621 Ringold Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011283  
Status: Unutilized

Comment: 2,370 sq. ft.; 2 story wood frame; possible asbestos; possible structure deficiencies  
 Bldg. T-2622  
 Fort Sill  
 2622 Ringold Road  
 Lawton, OK Co: Comanche  
 Landholding Agency: Army  
 Property Number: 219011285  
 Status: Unutilized  
 Comment: 2,370 sq. ft.; 2 story wood frame; possible asbestos; possible structure deficiencies  
 Bldg. T-2623  
 Fort Sill  
 2623 Ringold Road  
 Lawton, OK Co: Comanche  
 Landholding Agency: Army  
 Property Number: 219011287  
 Status: Unutilized  
 Comment: 2,400 sq. ft.; 2 story wood frame; asbestos; possible structure deficiencies  
 Bldg. T-2624  
 Fort Sill  
 2624 Miner Road  
 Lawton, OK Co: Comanche  
 Landholding Agency: Army  
 Property Number: 219011288  
 Status: Unutilized Comment: 3,738 sq. ft.; possible asbestos, wood frame; 2 floors; most recent use—day room  
 Bldg. T-2625  
 Fort Sill  
 2625 Ringold Road  
 Lawton, OK Co: Comanche  
 Landholding Agency: Army  
 Property Number: 219011289  
 Status: Unutilized Comment: 3,664 sq. ft.; wood frame; 2 floors; possible asbestos; most recent use—barracks  
 Bldg. T-2626  
 Fort Sill  
 2626 Ringold Road  
 Lawton, OK Co: Comanche  
 Landholding Agency: Army  
 Property Number: 219011291  
 Status: Unutilized Comment: 2,370 sq. ft.; 2 story wood frame; possible asbestos; possible structure deficiencies  
 Bldg. T-2627  
 Fort Sill  
 2627 Ringold Road  
 Lawton, OK Co: Comanche  
 Landholding Agency: Army  
 Property Number: 219011292  
 Status: Unutilized Comment: 2,370 sq. ft.; 2 story wood frame; possible asbestos; possible structure deficiencies  
 Bldg. T-2628  
 Fort Sill  
 2628 Ringold Road  
 Lawton, OK Co: Comanche  
 Landholding Agency: Army  
 Property Number: 219011294  
 Status: Unutilized Comment: 3,664 sq. ft.; possible asbestos, wood frame; 2 floors; most recent use—barracks  
 Bldg. T-2629  
 Fort Sill  
 2629 Ringold Road  
 Lawton, OK Co: Comanche  
 Landholding Agency: Army  
 Property Number: 219011296  
 Status: Unutilized Comment: 3,664 sq. ft.; 2 floors; possible asbestos, most recent use—barracks  
 Bldg. T-2630  
 Fort Sill  
 2630 Ringold Road  
 Lawton, OK Co: Comanche  
 Landholding Agency: Army  
 Property Number: 219011298  
 Status: Unutilized Comment: 3,664 sq. ft.; 2 floors; wood frame; most recent use—barracks  
 Bldg. T-2631  
 Fort Sill  
 2631 Ringold Road  
 Lawton, OK Co: Comanche  
 Landholding Agency: Army  
 Property Number: 219011299  
 Status: Unutilized Comment: 3,664 sq. ft.; possible asbestos; wood frame; 2 floors; most recent use—barracks  
 Bldg. T-2650  
 Fort Sill  
 2650 Ringold Road  
 Lawton, OK Co: Comanche  
 Landholding Agency: Army  
 Property Number: 219011301  
 Status: Unutilized Comment: 4,021 sq. ft.; 2 story; possible asbestos; possible structure deficiencies  
 Bldg. T-2780  
 Fort Sill  
 2780 Ringold Road  
 Lawton, OK Co: Comanche  
 Landholding Agency: Army  
 Property Number: 219011303  
 Status: Unutilized Comment: 6,385 sq. ft.; structurally unsound; asbestos; wood frame; 2 floors; most recent use—NCO Open Mess  
 Bldg. T-2781  
 Fort Sill  
 2781 Ringold Road  
 Lawton, OK Co: Comanche  
 Landholding Agency: Army  
 Property Number: 219011312  
 Status: Unutilized Comment: 2,229 sq. ft.; structurally unsound; wood frame, 2 floors; asbestos  
 Bldg. T-2931  
 Fort Sill  
 2931 Currie Road  
 Lawton, OK Co: Comanche  
 Landholding Agency: Army  
 Property Number: 219011313  
 Status: Unutilized Comment: 435 sq. ft.; structurally unsound; asbestos; wood frame; 1 floor  
 Bldg. T-3503  
 Fort Sill  
 3503 Sheridan Road  
 Lawton, OK Co: Comanche  
 Landholding Agency: Army  
 Property Number: 219011315  
 Status: Unutilized Comment: 1,720 sq. ft.; structurally unsound; asbestos; wood frame; 1 floor  
 Bldg. T-3507  
 Fort Sill  
 3507 Sheridan Road  
 Lawton, OK Co: Comanche  
 Landholding Agency: Army  
 Property Number: 219011316  
 Status: Unutilized Comment: 2,904 sq. ft.; possible asbestos; potential heavy metal contamination; wood frame; most recent use—chapel  
 Bldg. T-3508  
 Fort Sill  
 3508 Sheridan Road  
 Lawton, OK Co: Comanche  
 Landholding Agency: Army  
 Property Number: 219011318  
 Status: Unutilized Comment: 1,964 sq. ft.; structurally unsound; asbestos; wood frame; 1 floor, WWII Bldg.  
 Bldg. T-3513  
 Fort Sill  
 3513 Sheridan Road  
 Lawton, OK Co: Comanche  
 Landholding Agency: Army  
 Property Number: 219011318  
 Status: Unutilized Comment: 1,775 sq. ft.; one floor; most recent use—administrative  
 Bldg. T-3514  
 Fort Sill  
 3514 Sheridan Road  
 Lawton, OK Co: Comanche  
 Landholding Agency: Army  
 Property Number: 219011322  
 Status: Unutilized  
 Comment: 1,917 sq. ft.; possible asbestos; wood frames; most recent use—administrative  
 Bldg. T-3516  
 Fort Sill  
 3516 Packard Road  
 Lawton, OK Co: Comanche  
 Landholding Agency: Army  
 Property Number: 219011324  
 Status: Unutilized  
 Comment: 1,495 sq. ft.; possible asbestos; wood frame; most recent use—administrative  
 Bldg. T-3518  
 Fort Sill  
 3518 Sheridan Road  
 Lawton, OK Co: Comanche  
 Landholding Agency: Army  
 Property Number: 219011325  
 Status: Unutilized  
 Comment: 2,345 sq. ft.; possible asbestos; wood frame; most recent use—Headquarters Bldg.  
 Bldg. T-3519  
 Fort Sill

3519 Sheridan Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011326  
Status: Unutilized  
Comment: 1,711 sq. ft.; one floor; wood frame; most recent use—administrative  
Bldg. T-3524  
Fort Sill  
3524 Walker St.  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011327  
Status: Unutilized  
Comment: 1,603 sq. ft.; structurally unsound; asbestos; wood frame 1 floor; WWII Bldg.  
Bldg. T-3527  
Fort Sill  
3527 Sheridan Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011328  
Status: Unutilized  
Comment: 2,370 sq. ft.; structurally unsound; asbestos; wood frame; 2 floors; WWII Bldg.  
Bldg. T-3529  
Fort Sill  
3529 Sheridan Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011330  
Status: Unutilized  
Comment: 2,370 sq. ft.; structurally unsound; asbestos; wood frame; 2 floors  
Bldg. T-3534  
Fort Sill  
3534 Tacy Street  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011331  
Status: Unutilized  
Comment: 2,467 sq. ft.; structurally unsound; asbestos; wood frame; 1 floor; WWII Bldg.  
Bldg. T-3548  
Fort Sill  
3548 Tacy Street  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011332  
Status: Unutilized  
Comment: 393 sq. ft.; structurally unsound; possible asbestos; one story wood frame  
Bldg. T-3569  
Fort Sill  
3769 Currie Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011329  
Status: Unutilized  
Comment: 1,934 sq. ft.; structurally unsound; possible asbestos; two story wood frame  
Bldg. T-3549  
Fort Sill  
3549 Thomas Street  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011333  
Status: Unutilized  
Comment: 1,138 sq. ft.; structurally unsound; possible asbestos; one story wood frame  
Bldg. T-3562  
Fort Sill  
3562 Packard Street  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011334  
Status: Unutilized  
Comment: 1,027 sq. ft.; possible asbestos; wood frame; most recent use—storage  
Bldg. T-3638  
Fort Sill  
3638 Scott Street  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011336  
Status: Unutilized  
Comment: 1,618 sq. ft.; story wood frame; possible asbestos; possible structured deficiencies  
Bldg. T-3770  
Fort Sill  
3770 Hartell Blvd.  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011335  
Status: Unutilized  
Comment: 1,870 sq. ft.; structurally unsound; possible asbestos; two story frame  
Bldg. T-3760  
Fort Sill  
3760 Tacy Street  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011337  
Status: Unutilized  
Comment: 2,787 sq. ft.; structurally unsound; possible asbestos; one story wood frame  
Bldg. T-3767  
Fort Sill  
3767 Hartell Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011339  
Status: Unutilized  
Comment: 2,469 sq. ft.; structurally unsound; possible asbestos; one story wood frame;  
Bldg. T-3772  
Fort Sill  
3772 Hartell Blvd.  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011338  
Status: Unutilized  
Comment: 1,000 sq. ft.; structurally unsound; possible asbestos; one story wood frame  
Bldg. T-3773  
Fort Sill  
3773 Hartell Blvd.  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011340  
Status: Unutilized  
Comment: 1,117 sq. ft.; structurally unsound; possible asbestos; one story wood frame  
Bldg. T-3776  
Fort Sill  
3776 Hartell Blvd.  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011341  
Status: Unutilized  
Comment: 1,014 sq. ft.; structurally unsound; possible asbestos; one story wood frame  
Bldg. T-3777  
Fort Sill  
3777 Hartell Blvd.  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011342  
Status: Unutilized  
Comment: 1,117 sq. ft.; structurally unsound; possible asbestos; one story wood frame  
Bldg. T-3779  
Fort Sill  
3779 Currie Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011343  
Status: Unutilized  
Comment: 4,720 sq. ft.; possible asbestos, wood frame, 2 floors, most recent use—barracks  
Bldg. T-3780  
Fort Sill  
3780 Hartell Blvd.  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011344  
Status: Unutilized  
Comment: 4,720 sq. ft.; wood frame, 2 floors, possible asbestos, most recent use—barracks  
Bldg. T-3781  
Fort Sill  
3781 Hartell Blvd.  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011345  
Status: Unutilized  
Comment: 2,781 sq. ft.; structurally unsound; possible asbestos; one story wood frame  
Bldg. T-3788  
Fort Sill  
3788 Tacy Street

Lawton, OK Co: Comanche Landholding Agency: Army Property Number: 219011346 Status: Unutilized Comment: 2,758 sq. ft.; structurally unsound, possible asbestos; one story wood frame	Comment: 3,833 sq. ft., 1 floor, wood frame, asbestos, most recent use—classroom	Property Number: 219011364 Status: Unutilized Comment: 1,947 sq. ft.; no sanitary facilities; structurally unsound possible asbestos
Bldg. T-4363 Fort Sill 4364 McKee Street Lawton, OK Co: Comanche Landholding Agency: Army Property Number: 219011348 Status: Unutilized Comment: 1,947 sq. ft.; some utilities; possible structural deficiencies; possible asbestos	Bldg. T-4374 Fort Sill 4374 McKee Street Lawton, OK Co: Comanche Landholding Agency: Army Property Number: 219011355 Status: Unutilized Comment: 1,296 sq. ft.; possible structural deficiencies; possible asbestos; one story wood frame	Bldg. T-4525 Fort Sill 4524 Wilson Road Lawton, OK Co: Comanche Landholding Agency: Army Property Number: 219011363 Status: Unutilized Comment: 1,636 sq. ft., 1 floor, asbestos wood frame, most recent use—Exchange Service Outlet
Bldg. T-4520 Fort Sill 4520 Bragg Road Lawton, OK Co: Comanche Landholding Agency: Army Property Number: 219011347 Status: Unutilized Comment: 1,249 sq. ft.; 1 story wood frame, possible asbestos, possible structural deficiencies	Bldg. T-4375 Fort Sill 4375 Bragg Road Lawton, OK Co: Comanche Landholding Agency: Army Property Number: 219011356 Status: Unutilized Comment: 1,102 sq. ft.; structurally unsound, possible asbestos	Bldg. T-4386 Fort Sill 4386 Bragg Road Lawton, OK Co: Comanche Landholding Agency: Army Property Number: 219011365 Status: Unutilized Comment: 1,447 sq. ft.; no sanitary facilities; structurally unsound; possible asbestos
Bldg. T-4364 Fort Sill 4364 McKee Street Lawton, OK Co: Comanche Landholding Agency: Army Property Number: 219011349 Status: Unutilized Comment: 1,947 sq. ft.; some utilities; possible structural deficiencies; possible asbestos; two story wood frame	Bldg. T-4522 Fort Sill 4522 Wilson Street Lawton, OK Co: Comanche Landholding Agency: Army Property Number: 219011357 Status: Unutilized Comment: 4,307 sq. ft., possible asbestos, wood frame, two floors, most recent use—barracks	Bldg. T-4526 Fort Sill 4526 Wilson Road Lawton, OK Co: Comanche Landholding Agency: Army Property Number: 219011366 Status: Unutilized Comment: 3,833 sq. ft., 1 floor, asbestos wood frame, most recent use—recreation building
Bldg. T-4365 Fort Sill 4365 McKee Street Lawton, OK Co: Comanche Landholding Agency: Army Property Number: 219011350 Status: Unutilized Comment: 1,947 sq. ft.; some utilities; possible structural deficiencies; possible asbestos; two story wood frame	Bldg. T-4384 Fort Sill 4383 Bragg Road Lawton, OK Co: Comanche Landholding Agency: Army Property Number: 219011361 Status: Unutilized Comment: 1,947 sq. ft.; no sanitary facilities; structurally unsound; possible asbestos	Bldg. T-4387 Fort Sill 4387 Bragg Road Lawton, OK Co: Comanche Landholding Agency: Army Property Number: 219011367 Status: Unutilized Comment: 1,968 sq. ft.; no sanitary facilities; structurally unsound; possible asbestos; two story wood frame
Bldg. T-4366 Fort Sill 4366 McKee Street Lawton, OK Co: Comanche Landholding Agency: Army Property Number: 219011351 Status: Unutilized Comment: 1,951 sq. ft.; some utilities, possible structural deficiencies; possible asbestos; two story wood frame	Bldg. T-4383 Fort Sill 4388 Wilson Road Lawton, OK Co: Comanche Landholding Agency: Army Property Number: 219011368 Status: Unutilized Comment: 1,947 sq. ft.; no sanitary facilities; structurally unsound; possible asbestos	Bldg. T-4388 Fort Sill 4388 Wilson Road Lawton, OK Co: Comanche Landholding Agency: Army Property Number: 219011369 Status: Unutilized Comment: 2,845 sq. ft.; structurally unsound; possible asbestos; one story wood frame
Bldg. T-4521 Fort Sill 4521 Wilson Road Lawton, OK Co: Comanche Landholding Agency: Army Property Number: 219011352 Status: Unutilized	Bldg. T-4385 Fort Sill 4385 Bragg Road Lawton, OK Co: Comanche Landholding Agency: Army	Bldg. P-4489 Fort Sill 4489 Walker Street Lawton, OK Co: Comanche Landholding Agency: Army Property Number: 219011370 Status: Unutilized Comment: 1,045 sq. ft.; 1 story; concrete block structure, structurally unsound; possible asbestos

Bldg. T-4527  
Fort Sill  
4527 Wilson Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011369  
Status: Unutilized  
Comment: 4,196 sq. ft., wood frame, 1 floor; most recent use—exchange branch; possible asbestos

Bldg. 4528  
Fort Sill  
4528 Wilson Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011372  
Status: Unutilized  
Comment: 2,741 sq. ft., possible asbestos, possible structural deficiencies, one story wood frame

Bldg. T-4498  
Fort Sill  
4498 Walker Street  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011371  
Status: Unutilized  
Comment: 1,000 sq. ft.; wood frame; one floor; possible asbestos; most recent use—storage

Eldg. T-4500  
Fort Sill  
4500 Blair Street  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011373  
Status: Unutilized  
Comment: 1,239 sq. ft.; structurally unsound; possible asbestos; one story wood frame

Bldg. T-4530  
Fort Sill  
4530 Wilson Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011374  
Status: Unutilized  
Comment: 3,833 sq. ft., possible asbestos, possible structural deficiencies, one story wood frame

Bldg. T-4501  
Fort Sill  
4501 Wilson Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011375  
Status: Unutilized  
Comment: 2,797 sq. ft.; structurally unsound; possible asbestos; one story wood frame

Bldg. T-4502  
Fort Sill  
4501 Wilson Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011376  
Status: Unutilized

Comment: 2812 sq. ft.; structurally unsound; possible asbestos; one story wood frame

Bldg. T-4503  
Fort Sill  
4501 Wilson Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011378  
Status: Unutilized  
Comment: 2812 sq. ft.; asbestos, wood frame; 1 floor; most recent use—administrative

Bldg. T-4533  
Fort Sill  
4501 Wilson Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011377  
Status: Unutilized  
Comment: 1,415 sq. ft.; possible asbestos, possible structural deficiencies, one story wood frame

Bldg. T-4504  
Fort Sill  
4501 Wilson Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011379  
Status: Unutilized  
Comment: 2,833 sq. ft.; asbestos; wood frame; 1 floor; most recent use—administrative

Bldg. T-4506  
Fort Sill  
4501 Wilson Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011380  
Status: Unutilized  
Comment: 2,266 sq. ft.; asbestos; wood frame; 1 floor; most recent use—administrative/supply

Bldg. T-4534  
Fort Sill  
4501 Wilson Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011381  
Status: Unutilized  
Comment: 2,284 sq. ft.; 1 story wood frame; possible asbestos; possible structural deficiencies

Bldg. T-4507  
Fort Sill  
4501 Wilson Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011382  
Status: Unutilized  
Comment: 2,772 sq. ft.; asbestos; wood frame; 1 floor; most recent use—administrative

Bldg. T-4508  
Fort Sill  
4501 Wilson Road  
Lawton, OK Co: Comanche

Landholding Agency: Army  
Property Number: 219011383  
Status: Unutilized  
Comment: 3,833 sq. ft.; asbestos; wood frame; 1 floor; most recent use—classroom

Bldg. T-4535  
Fort Sill  
4501 Wilson Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011384  
Status: Unutilized  
Comment: 2,816 sq. ft.; 1 story wood frame; possible asbestos; possible structural deficiencies

Bldg. T-4509  
Fort Sill  
4501 Wilson Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011385  
Status: Unutilized  
Comment: 4,153 sq. ft.; asbestos; wood frame; 1 floor; most recent use—exchange branch

Bldg. T-4510  
Fort Sill  
4501 Wilson Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011386  
Status: Unutilized  
Comment: 3,006 sq. ft.; asbestos; wood frame; 1 floor; most recent use—medical storage

Bldg. T-4511  
Fort Sill  
4501 Wilson Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011388  
Status: Unutilized  
Comment: 2,760 sq. ft.; asbestos; wood frame; 2 floors; most recent use—classroom

Bldg. T-4540  
Fort Sill  
4501 Wilson Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011387  
Status: Unutilized  
Comment: 1,905 sq. ft.; possible asbestos; possible structural deficiencies; one story wood frame

Bldg. T-4513  
Fort Sill  
4501 Wilson Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011389  
Status: Unutilized  
Comment: 3,842 sq. ft.; asbestos; wood frame; 1 floor; most recent use—classroom

- Bldg. T-4514  
Fort Sill  
4501 Wilson Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011391  
Status: Unutilized  
Comment: 1,639 sq. ft.; asbestos; wood frame; 1 floor; most recent use—medical supply
- Bldg. T-4542  
Fort Sill  
4542 Hartell Blvd.  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011390  
Status: Unutilized  
Comment: 3,893 sq. ft., possible asbestos, possible structural deficiencies, two story wood frame
- Bldg. T-4516  
Fort Sill  
4516 Lewis Street  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011392  
Status: Unutilized  
Comment: 2,262 sq. ft.; 2 story wood frame; possible asbestos; possible structural deficiencies
- Bldg. T-4518  
Fort Sill  
4518 Wilson Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011393  
Status: Unutilized  
Comment: 1,311 sq. ft.; 1 story wood frame; possible asbestos; possible structural deficiencies
- Bldg. T-4519  
Fort Sill  
4519 Bragg Street  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011395  
Status: Unutilized  
Comment: 2,262 sq. ft.; 2 story wood frame; possible asbestos; possible structural deficiencies
- Bldg. T-4543  
Fort Sill  
4543 Hartell Blvd.  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011394  
Status: Unutilized  
Comment: 2,236 sq. ft., possible asbestos, possible structural deficiencies, one story wood frame
- Bldg. T-4544  
Fort Sill  
4544 Hartell Blvd.  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011396  
Status: Unutilized
- Comment: 782 sq. ft.; some utilities; possible asbestos; possible structural deficiencies; one story wood frame
- Bldg. T-4546  
Fort Sill  
4546 Bragg Road  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011397  
Status: Unutilized  
Comment: 2,833 sq. ft.; possible asbestos; possible structural deficiencies; one story wood frame
- Bldg. T-4548  
Fort Sill  
4548 Lewis Street  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011398  
Status: Unutilized  
Comment: 1,976 sq. ft.; 1 story wood frame; possible asbestos; structurally unsound
- Bldg. T-4551  
Fort Sill  
4551 Hartell Blvd.  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011399  
Status: Unutilized  
Comment: 435 sq. ft.; some utilities; possible asbestos; possible structural deficiencies; one story wood frame
- Bldg. T-4553  
Fort Sill  
4553 Hartell Blvd.  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011400  
Status: Unutilized  
Comment: 1,905 sq. ft.; some utilities; possible asbestos; possible structural deficiencies; one story wood frame
- Bldg. T-4556  
Fort Sill  
4556 Hartell Blvd.  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011401  
Status: Unutilized  
Comment: 2,308 sq. ft.; possible asbestos; possible structural deficiencies; one story wood frame
- Bldg. T-4557  
Fort Sill  
4557 Hartell Blvd.  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011402  
Status: Unutilized  
Comment: 456 sq. ft.; possible asbestos; some utilities; possible structural deficiencies; one story wood frame
- Bldg. T-4558  
Fort Sill  
4558 Hartell Blvd.  
Lawton, OK Co: Comanche
- Landholding Agency: Army  
Property Number: 219011403  
Status: Unutilized  
Comment: 4,012 sq. ft.; 2 story wood frame; possible asbestos; possible structural deficiencies
- Bldg. T-4559  
Fort Sill  
4559 Blair Street  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011404  
Status: Unutilized  
Comment: 1,557 sq. ft.; 1 story wood frame; no utilities
- Bldg. T-4720  
Fort Sill  
4720 Hartell Blvd.  
Lawton, OK Co: Comanche  
Landholding Agency: Army  
Property Number: 219011405  
Status: Unutilized  
Comment: 13,225 sq. ft.; visual asbestos; wood frame; 2 floors; most recent use—recreation bldg.
- Pennsylvania*
- Marine Corps Reserve Center  
RR 2, Box 569B  
Newcastle, PA Co: Lawrence  
Landholding Agency: Navy  
Property Number: 779010024  
Status: Unutilized  
Comment: 17,000 sq. ft.; 1 floor; most recent use—offices; needs rehab.
- Tennessee*
- Milan Army Ammunition Plant  
Area Q—Housing Area Q-25  
Milan, TN Co: Carroll  
Landholding Agency: Army  
Property Number: 219010560  
Status: Underutilized  
Comment: two story; wood frame; temporarily empty due to personnel rotation
- Virginia*
- Bldg. 1676  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219010971  
Status: Underutilized  
Comment: 3,300 sq. ft.; Selected periods reserved for military/training exercises; most recent use—Hdqs.  
Bldg.
- Bldg. 1663  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219010972  
Status: Underutilized  
Comment: 4,292 sq. ft.; selected periods reserved for military/training exercises; most recent use—barracks

- Bldg. 1677  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219010973  
Status: Underutilized  
Comment: 3,300 sq. ft.; selected periods are reserved for military/training exercises; most recent use—Hdqts.  
Bldg.
- Bldg. 1666  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219010974  
Status: Underutilized  
Comment: 1,300 sq. ft.; selected periods are reserved for military/training exercises; most recent use—Hdqts.  
Bldg.
- Bldg. 1687  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219010975  
Status: Underutilized  
Comment: 1,300 sq. ft.; selected periods are reserved for military/training exercises; most recent use—Hdqts.  
Bldg.
- Bldg. 1664  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219010976  
Status: Underutilized  
Comment: 4,292 sq. ft.; selected periods are reserved for military/training exercises; most recent use—barracks
- Bldg. 1696  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219010977  
Status: Underutilized  
Comment: 1,300 sq. ft.; selected periods are reserved for military/training exercises; most recent use—Hdqts.  
Bldg.
- Bldg. 1667  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219010978  
Status: Underutilized  
Comment: 11,000 sq. ft.; most recent use—mess hall; selected periods are reserved for military/training exercises
- Bldg. 1686  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219010980  
Status: Underutilized  
Comment: 11,000 sq. ft.; most recent use—mess hall; selected periods are reserved for military/training exercises
- reserved for military/training exercises
- Bldg. T2617  
For Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219010979  
Status: Underutilized  
Comment: 4,292 sq ft; selected periods are reserved for military training exercise, most recent use—barracks
- Bldg. 1690  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219010981  
Status: Underutilized  
Comment: 2,300 sq. ft.; selected periods are reserved for military/training exercises; most recent use—storage
- Bldg. T2620  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219010982  
Status: Underutilized  
Comment: 4,292 sq. ft.; selected periods are reserved for military/training exercises; most recent use—barracks
- Bldg. 2810  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219010983  
Status: Underutilized  
Comment: 3,500 sq. ft.; most recent use—mess hall; selected periods are reserved for military/training exercises
- Bldg. 2609  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219010985  
Status: Underutilized  
Comment: 1,200 sq. ft.; most recent use—recreation; selected periods are reserved for military/training exercises
- Bldg. T2621  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219010984  
Status: Underutilized  
Comment: 4,292 sq ft; selected periods are reserved for military training exercise, most recent use—barracks
- Bldg. 2602  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219010988  
Status: Underutilized  
Comment: 2,200 sq. ft.; most recent use—Recreation Bldg.; selected periods are reserved for military/training exercises
- Bldg. T2622  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219010987  
Status: Underutilized  
Comment: 4,292 sq. ft.; selected periods are reserved for military/training exercise; most recent use—barracks
- Bldg. 2808  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219010989  
Status: Underutilized  
Comment: 2,200 sq. ft.; most recent use—Recreation Bldg.; selected periods are reserved for military/training exercises
- Bldg. T2623  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219010990  
Status: Underutilized  
Comment: 4,292 sq. ft.; selected periods are reserved for military training exercise, most recent use—barracks
- Bldg. 1315  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219010991  
Status: Underutilized  
Comment: 4,038 sq. ft.; most recent use—housing; selected periods are reserved for military/training exercises
- Bldg. 1316  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219010992  
Status: Underutilized  
Comment: 4,038 sq. ft.; most recent use—housing; selected periods are reserved for military/training exercises
- Bldg. T2624  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219010993  
Status: Underutilized  
Comment: 4,292 sq. ft.; selected periods are reserved for military training exercise; most recent use—barracks
- Bldg. T1348  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219010994  
Status: Underutilized  
Comment: 2,256 sq. ft.; most recent use—housing; selected periods are reserved for military/training exercises
- Bldg. T2625  
Fort Pickett

Blackstone, VA Co: Nottoway	Status: Underutilized	Landholding Agency: Army	Landholding Agency: Army
Landholding Agency: Army	Comment: 2,900 sq. ft.; selected periods reserved for military/training exercises; most recent use—recreation/adm.	Property Number: 219011009	Property Number: 219011009
Property Number: 219011095	Bldg. T1365	Fort Pickett	Fort Pickett
Status: Underutilized	Blackstone, VA Co: Nottoway	Blackstone, VA Co: Nottoway	Blackstone, VA Co: Nottoway
Comment: 4,292 sq. ft.; selected periods are reserved for military training exercise; most recent use—barracks	Landholding Agency: Army	Landholding Agency: Army	Landholding Agency: Army
Bldg. T1365	Property Number: 219011096	Status: Underutilized	Property Number: 219011010
Fort Pickett	Comment: 2,256 sq. ft.; most recent use—housing; selected periods are reserved for military/training exercises	Comment: 4,292 sq. ft.; selected periods are reserved for military training exercise; most recent use—barracks	Status: Underutilized
Blackstone, VA Co: Nottoway	Bldg. 1309	Fort Pickett	Comment: 4,292 sq. ft.; selected periods are reserved for military training exercise; most recent use—barracks
Landholding Agency: Army	Fort Pickett	Blackstone, VA Co: Nottoway	Bldg. 2831
Property Number: 219011097	Blackstone, VA Co: Nottoway	Landholding Agency: Army	Fort Pickett
Status: Underutilized	Landholding Agency: Army	Property Number: 219011004	Blackstone, VA Co: Nottoway
Comment: 2,256 sq. ft.; most recent use—housing; selected periods are reserved for military/training exercises	Property Number: 219011005	Status: Underutilized	Landholding Agency: Army
Bldg. 1309	Comment: 2,900 sq. ft.; selected periods reserved for military/training exercises; most recent use—recreation/adm.	Comment: 2,900 sq. ft.; selected periods reserved for military/training exercises; most recent use—recreation/adm.	Property Number: 219011011
Fort Pickett	Bldg. 1887	Fort Pickett	Status: Underutilized
Blackstone, VA Co: Nottoway	Blackstone, VA Co: Nottoway	Blackstone, VA Co: Nottoway	Comment: 2,900 sq. ft.; selected periods reserved for military/training exercises; most recent use—recreation/adm.
Landholding Agency: Army	Landholding Agency: Army	Landholding Agency: Army	Bldg. 2832
Property Number: 219011098	Status: Underutilized	Property Number: 219011006	Fort Pickett
Status: Underutilized	Comment: 2,900 sq. ft.; selected periods reserved for military/training exercises; most recent use—recreation/adm.	Status: Underutilized	Blackstone, VA Co: Nottoway
Comment: 4,292 selected periods are reserved for military training exercise; most recent use—barracks	Bldg. 2205	Comment: 2,900 sq. ft.; selected periods reserved for military/training exercises; most recent use—recreation/adm.	Landholding Agency: Army
Bldg. 2610	Fort Pickett	Blackstone, VA Co: Nottoway	Property Number: 219011012
Fort Pickett	Blackstone, VA Co: Nottoway	Landholding Agency: Army	Status: Underutilized
Blackstone, VA Co: Nottoway	Landholding Agency: Army	Property Number: 219011007	Comment: 4,292 sq. ft.; selected periods are reserved for military training exercise; most recent use—barracks
Landholding Agency: Army	Property Number: 219011008	Status: Underutilized	Bldg. 2833
Property Number: 219011099	Comment: 2,900 sq. ft.; selected periods reserved for military/training exercises; most recent use—recreation/adm.	Comment: 2,900 sq. ft.; selected periods reserved for military/training exercises; most recent use—recreation/adm.	Fort Pickett
Status: Underutilized	Bldg. 2207	Blackstone, VA Co: Nottoway	Blackstone, VA Co: Nottoway
Comment: 2,256 sq. ft.; most recent use—housing; selected periods are reserved for military/training exercises	Fort Pickett	Landholding Agency: Army	Landholding Agency: Army
Bldg. T3055	Blackstone, VA Co: Nottoway	Property Number: 219011009	Property Number: 219011013
Fort Pickett	Landholding Agency: Army	Status: Underutilized	Status: Underutilized
Blackstone, VA Co: Nottoway	Property Number: 219011001	Comment: 2,900 sq. ft.; selected periods reserved for military/training exercises; most recent use—recreation/adm.	Comment: 2,900 sq. ft.; selected periods reserved for military/training exercises; most recent use—recreation/adm.
Landholding Agency: Army	Status: Underutilized	Bldg. 2834	Blackstone, VA Co: Nottoway
Property Number: 219011001	Comment: 2,307 sq. ft.; most recent use—recreation facility; selected periods are reserved for military/training exercises	Fort Pickett	Landholding Agency: Army
Status: Underutilized	Bldg. 2227	Blackstone, VA Co: Nottoway	Property Number: 219011015
Comment: 4,292 sq. ft.; selected periods are reserved for military training exercise; most recent use—barracks	Fort Pickett	Landholding Agency: Army	Status: Underutilized
Bldg. T2629	Blackstone, VA Co: Nottoway	Property Number: 219011008	Comment: 2,900 sq. ft.; selected periods reserved for military/training exercises; most recent use—recreation/adm.
Fort Pickett	Landholding Agency: Army	Status: Underutilized	Bldg. 2639
Blackstone, VA Co: Nottoway	Property Number: 219011000	Comment: 2,900 sq. ft.; selected periods reserved for military/training exercises; most recent use—recreation/adm.	Fort Pickett
Landholding Agency: Army	Status: Underutilized	Blackstone, VA Co: Nottoway	Blackstone, VA Co: Nottoway
Property Number: 219011000	Comment: 4,292 sq. ft.; selected periods are reserved for military training exercise; most recent use—barracks	Landholding Agency: Army	Landholding Agency: Army
Status: Underutilized	Bldg. 2228	Property Number: 219011014	Property Number: 219011014
Comment: 4,292 sq. ft.; selected periods are reserved for military training exercise; most recent use—barracks	Fort Pickett	Status: Underutilized	Status: Underutilized
Bldg. T1367	Blackstone, VA Co: Nottoway	Comment: 4,292 sq. ft.; selected periods are reserved for military training exercise; most recent use—barracks	Comment: 4,292 sq. ft.; selected periods are reserved for military training exercise; most recent use—barracks
Fort Pickett	Landholding Agency: Army	Bldg. 2835	Fort Pickett
Blackstone, VA Co: Nottoway	Property Number: 219011002	Blackstone, VA Co: Nottoway	Blackstone, VA Co: Nottoway
Landholding Agency: Army	Status: Underutilized	Landholding Agency: Army	Landholding Agency: Army
Property Number: 219011002	Comment: 2,256 sq. ft.; most recent use—housing; selected periods are reserved for military/training exercises	Property Number: 219011015	Property Number: 219011015

- Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219011016  
Status: Underutilized  
Comment: 2,900 sq. ft.; selected periods reserved for military/training exercises; most recent use—recreation/adm.  
Bldg. T2640  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219011017  
Status: Underutilized  
Comment: 4,292 sq. ft.; selected periods are reserved for military training exercise; most recent use—barracks  
Bldg. 2837  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219011018  
Status: Underutilized  
Comment: 2,900 sq. ft.; selected periods reserved for military/training exercises; most recent use—recreation/adm.  
Bldg. 2856  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219011019  
Status: Underutilized  
Comment: 2,900 sq. ft.; selected periods reserved for military/training exercises; most recent use—recreation/adm.  
Bldg. 3016  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219011021  
Status: Underutilized  
Comment: 2,900 sq. ft.; selected periods reserved for military/training exercises; most recent use—recreation/adm.  
Bldg. T2641  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219011020  
Status: Underutilized  
Comment: 4,292 sq. ft.; selected periods are reserved for military training exercise; most recent use—barracks  
Bldg. 3017  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219011022  
Status: Underutilized  
Comment: 2,900 sq. ft.; selected periods reserved for military/training exercises; most recent use—recreation/adm.  
Bldg. 3031
- Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219011024  
Status: Underutilized  
Comment: 2,900 sq. ft.; selected periods reserved for military/training exercises; most recent use—recreation/adm.  
Bldg. 2644  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219011023  
Status: Underutilized  
Comment: 4,292 sq. ft.; selected periods are reserved for military training exercise; most recent use—barracks  
Bldg. 3032  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219011025  
Status: Underutilized  
Comment: 2,900 sq. ft.; selected periods reserved for military/training exercises; most recent use—recreation/adm.  
Bldg. 3033  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219011026  
Status: Underutilized  
Comment: 2,900 sq. ft.; selected periods reserved for military/exercises; most recent use—recreation/adm.  
Bldg. 2645  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219011027  
Status: Underutilized  
Comment: 4,292 sq. ft.; selected periods are reserved for military training exercise; most recent use—barracks  
Bldg. 3034  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219011028  
Status: Underutilized  
Comment: 2,900 sq. ft.; selected periods reserved for military/training exercises; most recent use—recreation/adm.  
Bldg. 3035  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219011029  
Status: Underutilized  
Comment: 2,900 sq. ft.; selected periods reserved for military/training exercises; most recent use—recreation/adm.  
Bldg. 3036
- Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219011030  
Status: Underutilized  
Comment: 2,900 sq. ft.; selected periods reserved for military/training exercises; most recent use—recreation/adm.  
Bldg. 3057  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219011031  
Status: Underutilized  
Comment: 2,900 sq. ft.; selected periods reserved for military/training exercises; most recent use—recreation/adm.  
Bldg. 2646  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219011032  
Status: Underutilized  
Comment: 4,292 sq. ft.; selected periods reserved for military/training exercises; most recent use—barracks  
Bldg. 2647  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219011033  
Status: Underutilized  
Comment: 4,292 sq. ft.; selected periods reserved for military/training exercises; most recent use—barracks  
Bldg. 2648  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219011034  
Status: Underutilized  
Comment: 4,292 sq. ft.; selected periods reserved for military/training exercises; most recent use—barracks  
Bldg. 2650  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219011035  
Status: Underutilized  
Comment: 4,292 sq. ft.; selected periods reserved for military/training exercises; most recent use—barracks  
Bldg. 2814  
Fort Pickett  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219011036  
Status: Underutilized  
Comment: 4,292 sq. ft.; selected periods reserved for military/training exercises; most recent use—barracks  
Bldg. 1662  
Fort Pickett

**Blackstone, VA Co: Nottoway**  
**Landholding Agency: Army**  
**Property Number: 219011037**  
**Status: Underutilized**  
Comment: 2,500 sq. ft.; selected periods reserved for military/training exercises; most recent use—Hdqts.  
Bldg.  
**Bldg. 2815**  
Fort Pickett  
**Blackstone, VA Co: Nottoway**  
**Landholding Agency: Army**  
**Property Number: 219011038**  
**Status: Underutilized**  
Comment: 4,292 sq. ft.; selected periods reserved for military/training exercises; most recent use—barracks  
**Bldg. 1665**  
Fort Pickett  
**Blackstone, VA Co: Nottoway**  
**Landholding Agency: Army**  
**Property Number: 219011039**  
**Status: Underutilized**  
Comment: 2,500 sq. ft.; selected periods reserved for military/training exercises; most recent use—Hdqts.  
Bldg.  
**Bldg. 1688**  
Fort Pickett  
**Blackstone, VA Co: Nottoway**  
**Landholding Agency: Army**  
**Property Number: 219011041**  
**Status: Underutilized**  
Comment: 2,500 sq. ft.; selected periods reserved for military/training exercises; most recent use—Hdqts.  
Bldg.  
**Bldg. T2852**  
Fort Pickett  
**Blackstone, VA Co: Nottoway**  
**Landholding Agency: Army**  
**Property Number: 219011040**  
**Status: Underutilized**  
Comment: 4,292 sq. ft.; selected periods reserved for military/training exercises; most recent use—barracks  
**Bldg. 1689**  
Fort Pickett  
**Blackstone, VA Co: Nottoway**  
**Landholding Agency: Army**  
**Property Number: 219011042**  
**Status: Underutilized**  
Comment: 2,500 sq. ft.; selected periods reserved for military/training exercises; most recent use—Hdqts.  
Bldg.  
**Bldg. T2853**  
Fort Pickett  
**Blackstone, VA Co: Nottoway**  
**Landholding Agency: Army**  
**Property Number: 219011043**  
**Status: Underutilized**  
Comment: 4,292 sq. ft.; selected periods reserved for military/training exercises; most recent use—barracks  
**Bldg. 1691**  
Fort Pickett

**Blackstone, VA Co: Nottoway**  
**Landholding Agency: Army**  
**Property Number: 219011044**  
**Status: Underutilized**  
**Comment: 2,500 sq. ft.; selected periods reserved for military/training exercises; most recent use—Hdqts. Bldg.**  
**Bldg. T2854**  
**Fort Pickett**  
**Blackstone, VA Co: Nottoway**  
**Landholding Agency: Army**  
**Property Number: 219011046**  
**Status: Underutilized**  
**Comment: 4,292 sq. ft.; selected periods reserved for military/training exercises; most recent use—barracks**  
**Bldg. T2855**  
**Fort Pickett**  
**Blackstone, VA Co: Nottoway**  
**Landholding Agency: Army**  
**Property Number: 219011047**  
**Status: Underutilized**  
**Comment: 4,292 sq. ft.; selected periods reserved for military/training exercises; most recent use—barracks**  
**Bldg. 2402**  
**Fort Pickett**  
**Blackstone, VA Co: Nottoway**  
**Landholding Agency: Army**  
**Property Number: 219011045**  
**Status: Underutilized**  
**Comment: 1,176 sq. ft.; selected periods reserved for military/training exercises; most recent use—Hdqts. Bldg.**  
**Bldg. 2869**  
**Fort Pickett**  
**Blackstone, VA Co: Nottoway**  
**Landholding Agency: Army**  
**Property Number: 219011048**  
**Status: Underutilized**  
**Comment: 1,176 sq. ft.; selected periods reserved for military/training exercises; most recent use—Hdqts. Bldg.**  
**Bldg. T2410**  
**Fort Pickett**  
**Blackstone, VA Co: Nottoway**  
**Landholding Agency: Army**  
**Property Number: 219011049**  
**Status: Underutilized**  
**Comment: 1,176 sq. ft.; selected periods reserved for military/training exercises; most recent use—Hdqts. Bldg.**  
**Bldg. 1897**  
**Fort Pickett**  
**Blackstone, VA Co: Nottoway**  
**Landholding Agency: Army**  
**Property Number: 219011050**  
**Status: Underutilized**  
**Comment: 2,761 sq. ft.; most recent use—veh. maint. shop; selected periods are reserved for military/training exercises**  
**Bldg. 3002**

**Fort Pickett**  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219011051  
Status: Underutilized  
Comment: 1,176 sq. ft.; selected periods of time reserved for military/training exercises; most recent use—Hdqts.  
Bldg.  
Bldg. 3005  
**Fort Pickett**  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219011052  
Status: Underutilized  
Comment: 1,176 sq. ft.; selected periods of time reserved for military/training exercises; most recent use—Hdqts.  
Bldg.  
Bldg. 2229  
**Fort Pickett**  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219011053  
Status: Underutilized  
Comment: 2,761 sq. ft.; most recent use—veh. Maint. shop; selected periods are for military/training exercises  
Bldg. 2238  
**Fort Pickett**  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219011054  
Status: Underutilized  
Comment: 2,761 sq. ft.; most recent use—veh. maint. shop; selected periods are reserved for military/training exercises  
Bldg. 2239  
**Fort Pickett**  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219011055  
Status: Underutilized  
Comment: 2,761 sq. ft.; most recent use—veh. maint. shop; selected periods are reserved for military/training exercises  
Bldg. 2373  
**Fort Pickett**  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219011056  
Status: Underutilized  
Comment: 2,761 sq. ft.; most recent use—veh. maint. shop; selected periods are reserved for military/training exercises  
Bldg. 2462  
**Fort Pickett**  
Blackstone, VA Co: Nottoway  
Landholding Agency: Army  
Property Number: 219011057  
Status: Underutilized  
Comment: 2,761 sq. ft.; most recent use—veh. maint. shop; selected periods are





reserved for military/training exercises.	Status: Underutilized Comment: 2,900 sq ft; most recent use—dining fac; selected periods are reserved for military/training exercises.	Blackstone, VA Co: Nottoway Landholding Agency: Army Property Number: 219011099 Status: Underutilized Comment: 2,900 sq ft; most recent use—dining fac; selected periods are reserved for military/training exercises.
Bldg. 2220 Fort Pickett Blackstone, VA Co: Nottoway Landholding Agency: Army Property Number: 219011099 Status: Underutilized Comment: 2,900 sq ft; most recent use—dining fac; selected periods are reserved for military/training exercises.	Bldg. 2851 Fort Pickett Blackstone, VA Co: Nottoway Landholding Agency: Army Property Number: 219011114 Status: Underutilized Comment: 2,900 sq ft; most recent use—dining fac; selected periods are reserved for military/training exercises.	Bldg. 2850 Fort Pickett Blackstone, VA Co: Nottoway Landholding Agency: Army Property Number: 219011114 Status: Underutilized Comment: 2,900 sq ft; most recent use—dining fac; selected periods are reserved for military/training exercises.
Bldg. 2221 Fort Pickett Blackstone, VA Co: Nottoway Landholding Agency: Army Property Number: 219011100 Status: Underutilized Comment: 2,900 sq ft; most recent use—dining fac; selected periods are reserved for military/training exercises.	Bldg. 3010 Fort Pickett Blackstone, VA Co: Nottoway Landholding Agency: Army Property Number: 219011118 Status: Underutilized Comment: 2,900 sq ft; most recent use—dining fac; selected periods are reserved for military/training exercises.	Bldg. 3050 Fort Pickett Blackstone, VA Co: Nottoway Landholding Agency: Army Property Number: 219011147 Status: Underutilized Comment: 2,900 sq ft; most recent use—dining fac; selected periods are reserved for military/training exercises.
Bldg. 2826 Fort Pickett Blackstone, VA Co: Nottoway Landholding Agency: Army Property Number: 219011101 Status: Underutilized Comment: 2,900 sq ft; most recent use—dining fac; selected periods are reserved for military/training exercises.	Bldg. 3012 Fort Pickett Blackstone, VA Co: Nottoway Landholding Agency: Army Property Number: 219011121 Status: Underutilized Comment: 2,900 sq ft; most recent use—dining fac; selected periods are reserved for military/training exercises.	West Virginia
Bldg. 2827 Fort Pickett Blackstone, VA Co: Nottoway Landholding Agency: Army Property Number: 219011102 Status: Underutilized Comment: 2,900 sq ft; most recent use—dining fac; selected periods are reserved for military/training exercises.	Bldg. 3025 Fort Pickett Blackstone, VA Co: Nottoway Landholding Agency: Army Property Number: 219011140 Status: Underutilized Comment: 2,900 sq ft; most recent use—dining fac; selected periods are reserved for military/training exercises.	Naval & Marine Corps Res. Ctr. N. 13th St & Ohio River Wheeling, WV Co: Ohio Landholding Agency: Navy Property Number: 779010077 Status: Excess Comment: 32,000 sq. ft.; 1 floor; most recent use—offices; 15% of total space occupied; needs rehab; land leased from city—expires September 1990
Bldg. 2841 Fort Pickett Blackstone, VA Co: Nottoway Landholding Agency: Army Property Number: 219011103 Status: Underutilized Comment: 2,900 sq ft; most recent use—dining fac; selected periods are reserved for military/training exercises.	Bldg. 3028 Fort Pickett Blackstone, VA Co: Nottoway Landholding Agency: Army Property Number: 219011143 Status: Underutilized Comment: 2,900 sq ft; most recent use—dining fac; selected periods are reserved for military/training exercises.	Unsuitable Land (By State)
Bldg. 2842 Fort Pickett Blackstone, VA Co: Nottoway Landholding Agency: Army Property Number: 219011105 Status: Underutilized Comment: 2,900 sq ft; most recent use—dining fac; selected periods are reserved for military/training exercises.	Bldg. 3040 Fort Pickett Blackstone, VA Co: Nottoway Landholding Agency: Army Property Number: 219011143 Status: Underutilized Comment: 2,900 sq ft; most recent use—dining fac; selected periods are reserved for military/training exercises.	California
Bldg. 2850 Fort Pickett Blackstone, VA Co: Nottoway Landholding Agency: Army Property Number: 219011107 Status: Underutilized Comment: 2,900 sq ft; most recent use—dining fac; selected periods are reserved for military/training exercises.	Bldg. 3041 Fort Pickett Blackstone, VA Co: Nottoway Landholding Agency: Army Property Number: 219011145 Status: Underutilized Comment: 2,900 sq ft; most recent use—dining fac; selected periods are reserved for military/training exercises.	Salton Sea Test Range ElCentro, CA Co: Imperial Landholding Agency: Navy Property Number: 779010068 Status: Excess Reason: Secured Area
Bldg. 707-1 Indiana Army Ammunition Plant (INAAP) Charlestown, IN Co: Clark Landholding Agency: Army Property Number: 219010913 Status: Unutilized Reason: Within 2,000 ft. of flammable or explosive material—Secured Area	Bldg. 707-2 Indiana Army Ammunition Plant (INAAP) Charlestown, IN Co: Clark Landholding Agency: Army Property Number: 219010914 Status: Unutilized	Unsuitable Buildings (By State)
Bldg. 707-2 Indiana Army Ammunition Plant (INAAP) Charlestown, IN Co: Clark Landholding Agency: Army Property Number: 219010914 Status: Unutilized	T-1787 Fort Ord, CA Co: Monterey Landholding Agency: Army Property Number: 219010921 Status: Unutilized Reason: Within 2,000 ft. of flammable or explosive material—Secured Area	Indiana









Bldg. C110 Naval Construction Battalion Center Davisville, RI Co: Washington Landholding Agency: Navy Property Number: 779010051 Status: Underutilized Reason: Within 2,000 ft. of flammable or explosive material—Secured Area	Landholding Agency: Navy Property Number: 779010060 Status: Excess Reason: Within 2,000 ft. of flammable or explosive material—Secured Area	Reason: Within 2,000 ft. of flammable or explosive material—Secured Area
Bldg. 111 Naval Construction Battalion Center Davisville, RI Co: Washington Landholding Agency: Navy Property Number: 779010052 Status: Underutilized Reason: Within 2,000 ft. of flammable or explosive material—Secured Area	Bldg. S16A Naval Construction Battalion Center Davisville, RI Co: Washington Landholding Agency: Navy Property Number: 779010058 Status: Excess Reason: Within 2,000 ft. of flammable or explosive material—Secured Area	Bldg. C-118 Naval Construction Battalion Center Davisville, RI Co: Washington Landholding Agency: Navy Property Number: 779010071 Status: Excess Reason: Within 2,000 ft. of flammable or explosive material—Secured Area
Bldg. 103 Naval Construction Battalion Center Davisville, RI Co: Washington Landholding Agency: Navy Property Number: 779010054 Status: Excess Reason: Within 2,000 ft. of flammable or explosive material—Secured Area	Bldg. T 16 CT Naval Construction Battalion Center Davisville, RI Co: Washington Landholding Agency: Navy Property Number: 779010061 Status: Excess Reason: Within 2,000 ft. of flammable or explosive material—Secured Area	Bldg. T19 Naval Construction Battalion Center Davisville, RI Co: Washington Landholding Agency: Navy Property Number: 779010072 Status: Underutilized Reason: Within 2,000 ft. of flammable or explosive material—Secured Area
Bldg. W5A Naval Construction Battalion Center Davisville, RI Co: Washington Landholding Agency: Navy Property Number: 779010055 Status: Excess Reason: Within 2,000 ft. of flammable or explosive material—Secured Area	Bldg. A64 Naval Construction Battalion Center Davisville, RI Co: Washington Landholding Agency: Navy Property Number: 779010063 Status: Excess Reason: Within 2,000 ft. of flammable or explosive material—Secured Area	Bldg. 47 Naval Construction Battalion Center Davisville, RI Co: Washington Landholding Agency: Navy Property Number: 779010074 Status: Excess Reason: Within 2,000 ft. of flammable or explosive material—Secured Area
Bldg. S-16B Naval Construction Battalion Center Davisville, RI Co: Washington Landholding Agency: Navy Property Number: 779010053 Status: Excess Reason: Within 2,000 ft. of flammable or explosive material—Secured Area	Bldg. D272 Naval Construction Battalion Center Davisville, RI Co: Washington Landholding Agency: Navy Property Number: 779010064 Status: Excess Reason: Within 2,000 ft. of flammable or explosive material—Secured Area	Bldg. 48 Naval Construction Battalion Center Davisville, RI Co: Washington Landholding Agency: Navy Property Number: 779010076 Status: Excess Reason: Within 2,000 ft. of flammable or explosive material—Secured Area
Bldg. C-119 Naval Construction Battalion Center Davisville, RI Co: Washington Landholding Agency: Navy Property Number: 779010056 Status: Excess Reason: Within 2,000 ft. of flammable or explosive material—Secured Area	Bldg. 324 Naval Construction Battalion Center Davisville, RI Co: Washington Landholding Agency: Navy Property Number: 779010065 Status: Excess Reason: Within 2,000 ft. of flammable or explosive material—Secured Area	Bldg. T-1A Naval Construction Battalion Center Davisville, RI Co: Washington Landholding Agency: Navy Property Number: 779010078 Status: Excess Reason: Within 2,000 ft. of flammable or explosive material—Secured Area
Bldg. 332 Naval Construction Battalion Center Davisville, RI Co: Washington Landholding Agency: Navy Property Number: 779010057 Status: Excess Reason: Within 2,000 ft. of flammable or explosive material—Secured Area	Bldg. E108 Naval Construction Battalion Center Davisville, RI Co: Washington Landholding Agency: Navy Property Number: 779010067 Status: Excess Reason: Within 2,000 ft. of flammable or explosive material—Secured Area	Bldg. W-3A Naval Construction Battalion Center Davisville, RI Co: Washington Landholding Agency: Navy Property Number: 779010079 Status: Excess Reason: Within 2,000 ft. of flammable or explosive material—Secured Area
Bldg. T1 Naval Construction Battalion Center Davisville, RI Co: Washington Landholding Agency: Navy Property Number: 779010059 Status: Excess Reason: Within 2,000 ft. of flammable or explosive material—Secured Area	Bldg. T17 Naval Construction Battalion Center Davisville, RI Co: Washington Landholding Agency: Navy Property Number: 779010069 Status: Underutilized Reason: Within 2,000 ft. of flammable or explosive material—Secured Area	Tennessee
Bldg. E111 Naval Construction Battalion Center Davisville, RI Co: Washington Landholding Agency: Navy Property Number: 779010070 Status: Excess Reason: Within 2,000 ft. of flammable or explosive material—Secured Area	Bldg. A-68 Naval Construction Battalion Center Davisville, RI Co: Washington Landholding Agency: Navy Property Number: 779010070 Status: Excess	Milan Army Ammunition Plant MOD Igloo Area C-1109 Milan, TN Co: Gibson Landholding Agency: Army Property Number: 219010638 Status: Underutilized Reason: Within 2,000 ft. of flammable or explosive material—Secured Area
Bldg. D-81 D-Line Milan Army Ammunition Plant Milan, TN Co: Carroll Landholding Agency: Army Property Number: 219010922 Status: Unutilized		

Reason: Within 2,000 ft. of flammable or explosive material—Secured Area	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Comment: Friable asbestos
A-605 Mod-Igloo Area	Comment: Friable asbestos	Bldg. 2031
Milan Army Ammunition Plant	Badger Army Ammunition Plant	Change House
Milan, TN Co: Gibson/Carroll	Baraboo, WI Co: Sauk	Landholding Agency: Army
Landholding Agency: Army	Property Number: 219011115	Status: Unutilized
Property Number: 219010923	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Comment: Friable asbestos
Status: Underutilized	Comment: Friable asbestos	Bldg. 3031
Reason: Within 2,000 ft. of flammable or explosive material—Secured Area	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Badger Army Ammunition Plant
Bldg. 707-15	Comment: Friable asbestos	Change House
Indiana Army Ammunition Plant (INAAP)	Baraboo, WI Co: Sauk	Landholding Agency: Army
Charlestown, TN Co: Clark	Property Number: 219011116	Status: Unutilized
Landholding Agency: Army	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Comment: Friable asbestos
Property Number: 219010947	Comment: Friable asbestos	Bldg. 4031
Status: Utilized	Badger Army Ammunition Plant	Change House
Reason: Within 2,000 ft. of flammable or explosive material—Secured Area	Change House	Baraboo, WI Co: Sauk
Bldg. 707-16	Baraboo, WI Co: Sauk	Landholding Agency: Army
Indiana Army Ammunition Plant (INAAP)	Property Number: 219011117	Status: Unutilized
Charlestown, TN Co: Clark	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Comment: Friable asbestos
Landholding Agency: Army	Comment: Friable asbestos	Bldg. 5031
Property Number: 219010949	Badger Army Ammunition Plant	Change House
Status: Utilized	Change House	Baraboo, WI Co: Sauk
Reason: Within 2,000 ft. of flammable or explosive material—Secured Area	Baraboo, WI Co: Sauk	Landholding Agency: Army
Bldg. 707-17	Property Number: 219011118	Status: Unutilized
Indiana Army Ammunition Plant (INAAP)	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Comment: Friable asbestos
Charlestown, TN Co: Clark	Comment: Friable asbestos	Bldg. 2036
Landholding Agency: Army	Badger Army Ammunition Plant	Change House
Property Number: 219010951	Change House	Baraboo, WI Co: Sauk
Status: Utilized	Baraboo, WI Co: Sauk	Landholding Agency: Army
Reason: Within 2,000 ft. of flammable or explosive material—Secured Area	Property Number: 219011119	Status: Unutilized
<i>Wisconsin</i>	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Comment: Friable asbestos
Bldg. 1993-1	Comment: Friable asbestos	Bldg. 3016
Badger Army Ammunition Plant	Badger Army Ammunition Plant	Change House
Baraboo, WI Co: Sauk	Change House	Baraboo, WI Co: Sauk
Landholding Agency: Army	Baraboo, WI Co: Sauk	Landholding Agency: Army
Property Number: 219011094	Property Number: 219011120	Status: Unutilized
Status: Underutilized	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Comment: Friable asbestos
Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Comment: Friable asbestos	Bldg. 2036
Comment: Friable asbestos	Badger Army Ammunition Plant	Change House
Bldg. 227-1	Change House	Baraboo, WI Co: Sauk
Badger Army Ammunition Plant	Baraboo, WI Co: Sauk	Landholding Agency: Army
Change House	Property Number: 219011121	Status: Unutilized
Baraboo, WI Co: Sauk	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Comment: Friable asbestos
Landholding Agency: Army	Comment: Friable asbestos	Bldg. 5036
Property Number: 219011104	Badger Army Ammunition Plant	Change House
Status: Utilized	Change House	Baraboo, WI Co: Sauk
Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Baraboo, WI Co: Sauk	Landholding Agency: Army
Comment: Friable asbestos	Property Number: 219011122	Status: Unutilized
Bldg. 513-2	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Comment: Friable asbestos
Badger Army Ammunition Plant	Comment: Friable asbestos	Bldg. 3013
Change House	Badger Army Ammunition Plant	Change House
Baraboo, WI Co: Sauk	Change House	Baraboo, WI Co: Sauk
Landholding Agency: Army	Baraboo, WI Co: Sauk	Landholding Agency: Army
Property Number: 219011106	Property Number: 219011123	Status: Unutilized
Status: Unutilized	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Comment: Friable asbestos





Bldg. 5030	Badger Army Ammunition Plant	Badger Army Ammunition Plant	Standard Magazine
Administration-General Purpose		Standard Magazine	Baraboo, WI Co: Sauk
Baraboo, WI Co: Sauk		Baraboo, WI Co: Sauk	Landholding Agency: Army
Landholding Agency: Army		Property Number: 219011171	Property Number: 219011178
Property Number: 219011165		Status: Unutilized	Status: Unutilized
Status: Unutilized		Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area
Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area		Comment: Friable asbestos.	Comment: Friable asbestos
Comment: Friable asbestos.			
Bldg. 1906-31	Badger Army Ammunition Plant	Bldg. 1906-12	Bldg. 1932-25
Standard Magazine		Badger Army Ammunition Plant	Badger Army Ammunition Plant
Baraboo, WI Co: Sauk		Standard Magazine	Cannon Magazine
Landholding Agency: Army		Baraboo, WI Co: Sauk	Baraboo, WI Co: Sauk
Property Number: 219011166		Landholding Agency: Army	Landholding Agency: Army
Status: Unutilized		Property Number: 219011172	Property Number: 219011176
Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area		Status: Unutilized	Status: Unutilized
Comment: Friable asbestos.		Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area
Bldg. 1906-42	Badger Army Ammunition Plant	Comment: Friable asbestos.	Comment: Friable asbestos
Standard Magazine		Bldg. 1906-13	Bldg. 1906-39
Baraboo, WI Co: Sauk		Badger Army Ammunition Plant	Badger Army Ammunition Plant
Landholding Agency: Army		Standard Magazine	Standard Magazine
Property Number: 219011168		Baraboo, WI Co: Sauk	Baraboo, WI Co: Sauk
Status: Unutilized		Landholding Agency: Army	Landholding Agency: Army
Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area		Property Number: 219011173	Property Number: 219011179
Comment: Friable asbestos.		Status: Unutilized	Status: Unutilized
Bldg. 1993-2	Badger Army Ammunition Plant	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area
Administration-General Purpose		Comment: Friable asbestos.	Comment: Friable asbestos
Baraboo, WI Co: Sauk		Bldg. 1906-23	Bldg. 1932-2
Landholding Agency: Army		Badger Army Ammunition Plant	Badger Army Ammunition Plant
Property Number: 219011167		Standard Magazine	Cannon Magazine
Status: Unutilized		Baraboo, WI Co: Sauk	Baraboo, WI Co: Sauk
Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area		Landholding Agency: Army	Landholding Agency: Army
Comment: Friable asbestos.		Property Number: 219011174	Property Number: 219011180
Bldg. 1906-46	Badger Army Ammunition Plant	Status: Unutilized	Status: Unutilized
Standard Magazine		Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area
Baraboo, WI Co: Sauk		Comment: Friable asbestos.	Comment: Friable asbestos
Landholding Agency: Army		Bldg. 1906-28	Bldg. 1932-7
Property Number: 219011169		Badger Army Ammunition Plant	Badger Army Ammunition Plant
Status: Unutilized		Standard Magazine	Cannon Magazine
Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area		Baraboo, WI Co: Sauk	Baraboo, WI Co: Sauk
Comment: Friable asbestos.		Landholding Agency: Army	Landholding Agency: Army
Bldg. 1906-50	Badger Army Ammunition Plant	Property Number: 219011175	Property Number: 219011181
Standard Magazine		Status: Unutilized	Status: Unutilized
Baraboo, WI Co: Sauk		Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area
Landholding Agency: Army		Comment: Friable asbestos.	Comment: Friable asbestos
Property Number: 219011170		Bldg. 1906-34	Bldg. 1906-43
Status: Unutilized		Badger Army Ammunition Plant	Badger Army Ammunition Plant
Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area		Standard Magazine	Standard Magazine
Comment: Friable asbestos.		Baraboo, WI Co: Sauk	Baraboo, WI Co: Sauk
Bldg. 1906-4		Landholding Agency: Army	Landholding Agency: Army
		Property Number: 219011177	Property Number: 219011182
		Status: Unutilized	Status: Unutilized
		Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area
		Comment: Friable asbestos.	Comment: Friable asbestos
		Bldg. 1906-33	Bldg. 1906-40
		Badger Army Ammunition Plant	Badger Army Ammunition Plant
			Standard Magazine



Status: Unutilized	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Comment: Friable asbestos	Bldg. 9100-2	Comment: Friable asbestos
Bldg. 1932-23	Badger Army Ammunition Plant	Cannon Magazine	Badger Army Ammunition Plant	Badger Army Ammunition Plant
Baraboo, WI Co: Sauk	Landholding Agency: Army	Property Number: 219011202	Richmond Magazine	Richmond Magazine
Status: Unutilized	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Comment: Friable asbestos	Baraboo, WI Co: Sauk	Baraboo, WI Co: Sauk
Bldg. 1906-45	Badger Army Ammunition Plant	Standard Magazine	Landholding Agency: Army	Landholding Agency: Army
Baraboo, WI Co: Sauk	Property Number: 219011203	Status: Underutilized	Property Number: 219011209	Property Number: 219011213
Status: Unutilized	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Comment: Friable asbestos	Status: Unutilized	Status: Unutilized
Bldg. 1906-49	Badger Army Ammunition Plant	Standard Magazine	Bldg. 1975-2	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area
Baraboo, WI Co: Sauk	Landholding Agency: Army	Property Number: 219011204	Badger Army Ammunition Plant	Comment: Friable asbestos
Status: Unutilized	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Comment: Friable asbestos	Baraboo, WI Co: Sauk	Bldg. 1975-2
Bldg. 1906-50	Badger Army Ammunition Plant	Standard Magazine	Landholding Agency: Army	Badger Army Ammunition Plant
Baraboo, WI Co: Sauk	Property Number: 219011205	Status: Underutilized	Property Number: 219011215	Baraboo, WI Co: Sauk
Status: Unutilized	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Comment: Friable asbestos	Status: Unutilized	Landholding Agency: Army
Bldg. 1932-9	Badger Army Ammunition Plant	Cannon Magazine	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Property Number: 219011216
Baraboo, WI Co: Sauk	Landholding Agency: Army	Property Number: 219011206	Comment: Friable asbestos	Badger Army Ammunition Plant
Status: Unutilized	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Comment: Friable asbestos	Baraboo, WI Co: Sauk	Richmond Magazine
Bldg. 1906-56	Badger Army Ammunition Plant	Standard Magazine	Landholding Agency: Army	Baraboo, Magazine WI Co: Sauk
Baraboo, WI Co: Sauk	Property Number: 219011207	Status: Underutilized	Property Number: 219011217	Landholding Agency: Army
Status: Unutilized	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Comment: Friable asbestos	Status: Unutilized	Property Number: 219011218
Bldg. 1906-58	Badger Army Ammunition Plant	Post HQ	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area
Baraboo, WI Co: Sauk	Landholding Agency: Army	Property Number: 219011212	Comment: Friable asbestos	Comment: Friable asbestos
Status: Unutilized	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Comment: Friable asbestos	Status: Unutilized	Bldg. 9100-4
Bldg. 1906-54	Badger Army Ammunition Plant	Administration	Badger Army Ammunition Plant	Badger Army Ammunition Plant
Baraboo, WI Co: Sauk	Landholding Agency: Army	Property Number: 219011214	Richmond Magazine	Richmond Magazine
Status: Unutilized	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Comment: Friable asbestos	Baraboo, WI Co: Sauk	Baraboo, WI Co: Sauk
Bldg. 200	Badger Army Ammunition Plant	Administration	Landholding Agency: Army	Landholding Agency: Army
Baraboo, WI Co: Sauk	Property Number: 219011215	Status: Unutilized	Property Number: 219011219	Property Number: 219011220
Status: Unutilized	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Comment: Friable asbestos	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area
Bldg. 214	Badger Army Ammunition Plant	Administration	Comment: Friable asbestos	Comment: Friable asbestos
Baraboo, WI Co: Sauk	Landholding Agency: Army	Property Number: 219011216	Bldg. 9100-5	Bldg. 9100-6
Status: Unutilized	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Comment: Friable asbestos	Badger Army Ammunition Plant	Badger Army Ammunition Plant
Bldg. 9100-6	Badger Army Ammunition Plant	Administration	Richmond Magazine	Richmond Magazine
Baraboo, WI Co: Sauk	Landholding Agency: Army	Property Number: 219011217	Baraboo, WI Co: Sauk	Baraboo, WI Co: Sauk
Status: Unutilized	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Comment: Friable asbestos	Landholding Agency: Army	Landholding Agency: Army





Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Comment: Friable asbestos	Bldg. 9016-1
Comment: Friable asbestos	Bldg. 6532-15	Badger Army Ammunition Plant
Bldg. 6532-9	Badger Army Ammunition Plant	Change House
Badger Army Ammunition Plant	Change House	Baraboo, WI Co: Sauk
Change House	Baraboo, WI Co: Sauk	Landholding Agency: Army
Baraboo, WI Co: Sauk	Property Number: 219011305	Property Number: 219011311
Landholding Agency: Army	Status: Unutilized	Status: Unutilized
Property Number: 219011293	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area
Status: Unutilized	Comment: Friable asbestos	Comment: Friable asbestos
Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Bldg. 6532-16	Bldg. 9016-3
Comment: Friable asbestos	Badger Army Ammunition Plant	Badger Army Ammunition Plant
Bldg. 6532-10	Change House	Change House
Badger Army Ammunition Plant	Baraboo, WI Co: Sauk	Baraboo, WI Co: Sauk
Change House	Landholding Agency: Army	Landholding Agency: Army
Baraboo, WI Co: Sauk	Property Number: 219011306	Property Number: 219011317
Landholding Agency: Army	Status: Unutilized	Status: Unutilized
Property Number: 219011295	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area
Status: Unutilized	Comment: Friable asbestos	Comment: Friable asbestos
Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Bldg. 6532-17	Bldg. 9504-1
Comment: Friable asbestos	Badger Army Ammunition Plant	Badger Army Ammunition Plant
Bldg. 6532-11	Change House	Change House
Badger Army Ammunition Plant	Baraboo, WI Co: Sauk	Baraboo, WI Co: Sauk
Change House	Landholding Agency: Army	Landholding Agency: Army
Baraboo, WI Co: Sauk	Property Number: 219011307	Property Number: 219011319
Landholding Agency: Army	Status: Unutilized	Status: Unutilized
Property Number: 219011297	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area
Status: Unutilized	Comment: Friable asbestos	Comment: Friable asbestos
Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Bldg. 6532-18	Bldg. 9504-2
Comment: Friable asbestos	Badger Army Ammunition Plant	Badger Army Ammunition Plant
Bldg. 6532-12	Change House	Change House
Badger Army Ammunition Plant	Baraboo, WI Co: Sauk	Baraboo, WI Co: Sauk
Change House	Landholding Agency: Army	Landholding Agency: Army
Baraboo, WI Co: Sauk	Property Number: 219011308	Property Number: 219011320
Landholding Agency: Army	Status: Unutilized	Status: Unutilized
Property Number: 219011300	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area
Status: Unutilized	Comment: Friable asbestos	Comment: Friable asbestos
Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Bldg. 6532-19	Bldg. 9504-3
Comment: Friable asbestos	Badger Army Ammunition Plant	Badger Army Ammunition Plant
Bldg. 6532-13	Change House	Change House
Badger Army Ammunition Plant	Baraboo, WI Co: Sauk	Baraboo, WI Co: Sauk
Change House	Landholding Agency: Army	Landholding Agency: Army
Baraboo, WI Co: Sauk	Property Number: 219011309	Property Number: 219011321
Landholding Agency: Army	Status: Unutilized	Status: Unutilized
Property Number: 219011302	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area
Status: Unutilized	Comment: Friable asbestos	Comment: Friable asbestos
Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Bldg. 6532-20	Bldg. 9504-4
Comment: Friable asbestos	Badger Army Ammunition Plant	Badger Army Ammunition Plant
Bldg. 6532-14	Change House	Change House
Badger Army Ammunition Plant	Baraboo, WI Co: Sauk	Baraboo, WI Co: Sauk
Change House	Landholding Agency: Army	Landholding Agency: Army
Baraboo, WI Co: Sauk	Property Number: 219011310	Property Number: 219011323
Landholding Agency: Army	Status: Unutilized	Status: Unutilized
Property Number: 219011304	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area
Status: Unutilized	Comment: Friable asbestos	Comment: Friable asbestos
Reason: Within 2,000 ft. of flammable or explosive material—Other environmental, Secured Area	Comment: Friable asbestos	Universe of Properties:

Total = 588  
 Suitable = 299  
 Suitable Buildings = 290  
 Suitable Land = 9  
 Unsuitable = 289  
 Unsuitable Buildings = 288  
 Unsuitable Land = 1  
 Number of Resubmissions = 0  
 [FR Doc. 90-3449 Filed 2-15-90; 8:45 am]  
 BILLING CODE 4210-29-M

Wilderness study area name	Total acres	Acres suitable	Acres nonsuitable
Lahontan Cutthroat Trout ISA.....	12,316	0	12,316
Totals.....	200,918	22,195	178,723

The Bureau of Land Management wilderness proposals will ultimately be forwarded by the Secretary of the Interior to the President and by the President to Congress. The final decision on wilderness designation rests with Congress.

In any case, no action on these proposals can be taken by the Secretary of the Interior during the 30 days following the filing of this EIS. This complies with the Council of Environmental Quality Regulations, 40 CFR 1506.10b(2).

**SUPPLEMENTARY INFORMATION:** Copies of the environmental impact statement may be obtained from the District Manager, Bureau of Land Management, Las Vegas District, 4765 W. Vegas Dr., P.O. Box 26569, Las Vegas, Nevada 89126 or call (702) 646-8800.

Copies are also available for inspection at the following locations: Department of the Interior, Bureau of Land Management, Office of Public Affairs, 18th and C Streets, NW., Washington, DC 20240

Bureau of Land Management, Nevada State Office, 850 Harvard Way, P.O. Box 1200; Reno, Nevada 89520

Bureau of Land Management, Winnemucca District, 705 E. 4th Street, Winnemucca, Nevada 89445

Bureau of Land Management, Ely District, Star Route 5, Box 1, Ely, Nevada 89301

#### FOR FURTHER INFORMATION CONTACT:

Bob Taylor, District Wilderness Coordinator, at 4765 W. Vegas Drive, P.O. Box 26569, Las Vegas, Nevada 89126, (702) 646-8800, or Dave Wolf, Nevada BLM Wilderness Coordinator, 850 Harvard Way, P.O. Box 1200, Reno, Nevada 89520, (702) 328-6281.

Dated: January 19, 1990.

Jonathan P. Deason,

Director, Office of Environmental Affairs.

[FR Doc. 90-2999 Filed 2-15-90; 8:45 am]

BILLING CODE 4310-22-M

[ID-942-00-4730-12]

#### Filing of Plats of Survey; Idaho

The plats of survey of the following described land were officially filed in the Idaho State Office, Bureau of Land Management, Boise, Idaho, effective 10 a.m., February 7, 1990.

The plat representing the dependent resurvey of portions of the west boundary and subdivisional lines, and subdivision of section 18, T. 1 N., R. 3 W., Boise Meridian, Idaho, Group 725, was accepted February 6, 1990.

The supplemental plat representing the revised lottings in section 15, T. 22 N., R. 5 E., Boise Meridian, Idaho, was accepted February 2, 1990.

This survey was executed and the supplemental plat prepared to meet certain administrative needs of this Bureau.

All inquiries about this land should be sent to the Idaho State Office, Bureau of Land Management, 3380 Americana Terrace, Boise, Idaho 83706.

Dated: February 7, 1990.

Duane E. Olsen,

Chief Cadastral Surveyor for Idaho.

[FR Doc. 90-3678 Filed 2-15-90; 8:45 am]

BILLING CODE 4310-GG-M

#### National Park Service

#### Acadia National Park Advisory Commission; Meeting

Notice is hereby given in accordance with the Federal Advisory Committee Act (Pub. L. 92-463, 86 Stat. 770, 5 U.S.C. app. 1, sec. 10), that the Acadia National Park Advisory Commission will hold a meeting on Monday, March 5, 1990.

The Commission was established pursuant to Public Law 99-420, section 103. The purpose of the Commission is to consult with the Secretary of the Interior, or his designee, on matters relating to the management and development of the Park, including but not limited to the acquisition of lands and interests in lands (including conservation easements on islands) and termination of rights of use and occupancy.

The meeting will convene at Acadia National Park Headquarters, McFarland Hill, Rt. 233, Bar Harbor, Maine, at 1:00 p.m. to consider the following agenda:

##### 1. Old Business.

##### 2. New Business:

###### A. Committee Reports—

- (1) Acquisition Committee Reports
- (2) Easement Committee Reports

###### B. Annual Report of the Advisory Commission

###### C. Election of Officers

###### D. Otter Creek Landing

###### E. Superintendent's Report

##### 3. Proposed agenda and date of next Commission meeting.

The Commission meeting is open to the public. Interested persons may make oral/written presentations to the Commission or file written statements. Such requests should be made to the official listed below at least seven days prior to the meeting.

Further information concerning this meeting may be obtained from the Superintendent, Acadia National Park, P.O. Box 177, Bar Harbor, Maine 04609.

Dated: February 7, 1990.

**Gerald D. Patten,**  
Regional Director.

[FR Doc. 90-3736 Filed 2-15-90; 8:45 am]

BILLING CODE 4310-70-M

## INTERSTATE COMMERCE COMMISSION

### Motor Passenger Carrier or Water Carrier Finance Applications Under 49 U.S.C. 11343-11344

The following applications seek approval to consolidate, purchase, merge, lease operating rights and properties of, or acquire control of motor passenger carriers or water carriers pursuant to 49 U.S.C. 11343-11344. The applications are governed by 49 CFR part 1182, as revised in *Pur., Merger & Cont.-Motor Passenger & Water Carriers*, 5 I.C.C.2d 786 (1989). The findings for these applications are set forth at 49 CFR 1182.18. Persons wishing to oppose an application must follow the rules under 49 CFR 1182, subpart B. If no one timely opposes the application, this publication automatically will become the final action of the Commission.

MC-F-19574, filed January 16, 1990.

Edward F.X. Gallagher—Continuation in Control—Hendrick Hudson Bus Lines, Inc. Applicant's representative: Jeremy Kahn, 1726 M Street NW., Suite 702, Washington, DC 20036.

Applicant Edward F.X. Gallagher (Mr. Gallagher) is in control: (1) Of Leprechaun Lines, Inc. (Leprechaun) (MC-112108), and of Newburgh Beacon Bus Corp. (Newburgh) (MC-114755), common carriers of passengers; and (2) of Hendrick Hudson Bus Lines, Inc. (new Hendrick, a newly formed New York corporation originally named Irving Lines, Inc.), a noncarrier which recently purchased certain assets, including ICC certificate No. MC-205287 and the New York intrastate operating authority of the original Hendrick Hudson Bus Lines, Inc. Mr. Gallagher owns all the stock of Leprechaun and Newburgh, and 70 percent of the stock of new Hendrick. He is also president and a director of all three carriers.

The common control relationship involving Leprechaun and Newburgh

appears not to have required Commission approval. Upon issuance of authority to the new Hendrick, Gallagher will be in control of three carriers. Approval of the transaction insofar as it involves the acquisition of control of intrastate authority is effected under 49 U.S.C. 11341(a).

Decided: February 13, 1990.

By the Commission, the Motor Carriers Board.

**Noreta R. McGee,**

Secretary.

[FR Doc. 90-3711 Filed 2-15-90; 8:45 am]

BILLING CODE 7035-01-M

[Docket No. AB-55 (Sub 339X)]

### CSX Transportation, Inc.—Abandonment Exemption—in Hopkins County, KY

Applicant has filed a notice of exemption under 49 CFR part 1152 Subpart F—*Exempt Abandonments* to abandon its 4.66-mile line of railroad between milepost LHI-265.78, at Chesley, and milepost LHI-270.44, at Little Joe, Hopkins County, KY.

Applicant has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) any overhead traffic on the line can be rerouted over other lines; and (3) no formal complaint filed by a user of rail service on the line (or a State or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Commission or with any U.S. District Court or has been decided in favor of the complainant within the 2-year period. The appropriate State agency has been notified in writing at least 10 days prior to the filing of this notice.

As a condition to use of this exemption, any employee affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). To address this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10505(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance has been received, this exemption will be effective on March 18, 1990 (unless stayed pending reconsideration). Petitions to stay that do not involve environmental issues,<sup>1</sup>

<sup>1</sup> A stay will be routinely issued by the Commission in those proceedings where an informed decision on environmental issues (whether raised by a party or by the Section of Energy and Environment in its independent investigation) cannot be made prior to the effective date of the notice of exemption. See *Exemption of Out-of-*

formal expressions of intent to file an offer of financial assistance under 49 CFR 1152.27(c)(2),<sup>2</sup> and trail use/rail banking statements under 49 CFR 1152.29 must be filed by February 26, 1990.<sup>3</sup> Petitions for reconsideration or requests for public use conditions under 49 CFR 1152.28 must be filed by March 8, 1990, with: Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

A copy of any petition filed with the Commission should be sent to applicant's representative: Charles M. Rosenberger, CSX Transportation, Inc., 500 Water Street, Jacksonville, FL 32202.

If the notice of exemption contains false or misleading information, use of the exemption is void *ab initio*.

Applicant has filed an environmental report which addresses environmental or energy impacts, if any, from this abandonment.

The Section of Energy and Environment (SEE) will prepare an environmental assessment (EA). SEE will issue the EA by February 21, 1990. Interested persons may obtain a copy of the EA from SEE by writing to it (Room 3219, Interstate Commerce Commission, Washington, DC 20423) or by calling Elaine Kaiser, Chief, SEE at (202) 275-7684. Comments on environmental and energy concerns must be filed within 15 days after the EA becomes available to the public.

Environmental, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Decided: February 12, 1990.

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

**Noreta R. McGee,**  
Secretary.

[FR Doc. 90-3713 Filed 2-15-90; 8:45 am]  
BILLING CODE 7035-01-M

### Release of Waybill Data for use by DNS Associates, Inc., for an Unnamed Class I Rail System

The Commission has received a request from DNS Associates, Inc., for permission to use certain data from the

*Service Rail Lines*, 5 I.C.C.2d 377 (1989). An entity seeking a stay involving environmental concerns is encouraged to file its request as soon as possible in order to permit this Commission to review and act on the request before the effective date of this exemption.

<sup>2</sup> See *Exempt. of Rail Abandonment—Offers of Finan. Assist.*, 4 I.C.C.2d 164 (1987).

<sup>3</sup> The Commission will accept a late-filed trail use statement so long as it retains jurisdiction to do so.

Commission's 1987 ICC Waybill Sample. The data will be used exclusively by DNS for a study, to be performed for a Class I rail system, to update the carrier's analysis of the potential impacts of various rail consolidations. DNS Associates, Inc., will use the information from the ICC Waybill File in its traffic diversion model, and provide only the aggregate impacts on carloads, net tonnages, and the carrier's revenues to the client railroad. No geographic detail information will be released to the client railroad, below the level of total traffic flows moving via various junctions. The data requested are:

1. Records of all traffic with one endpoint in AB, AK, AR, AZ, BC, CA, CO, IA, ID, KS, MB, MN, MT, ND, NE, NM, NT, NV, OK, OR, SD, SK, TX, UT, WA, WI, WY.

2. For the above traffic, the following fields are requested: Unique Serial Number, Number of Carloads, Car Initial, TOFC/COFC Plan, Number of TOFC/COFC, Two-digit Commodity Code (STCC-HAZMAT), Billed Weight, Stratum Identification Code, Subsample Code, Origin and Termination FSAC, Origin and Termination Railroad, All Interchanges, All Bridge Railroads, AAR Car Type, Origin and Destination SPLC, Junction Frequency, Expansion Factor, Origin and Destination State Alpha, Origin and Destination Freight Territory.

The Commission requires rail carriers to file waybill sample information if in any of the past three years they terminated on their lines: (1) 4,500 revenue carloads or (2) 5 percent of revenue carloads in any one State (49 CFR part 1244). From the waybill information, the Commission has developed a Public Use Waybill File that has satisfied the majority of all our waybill data requests while protecting the confidentiality of proprietary data submitted by the railroads. However, if confidential waybill data are requested, as in this case, we will consider releasing the data only after certain protective conditions are met and public notice is given. More specifically, under the Commission's current policy for handling waybill requests, we will not release any confidential waybill data until after: (1) Public notice is provided so affected parties have an opportunity to object and (2) certain requirements designed to protect the data's confidentiality are agreed to by the requesting party (Ex Parte No. 385 (Sub-No. 2), 52 FR 12415, April 16, 1987).

Accordingly, if any parties object to this request, they should file their objections (an original and 2 copies)

with the Director of the Commission's Office of Transportation Analysis (OTA) within 14 calendar days of the publication of this notice. They should also include all grounds for objections to the full or partial disclosure of the requested data. The Director of OTA will consider these objections in determining whether to release the requested waybill data. Any parties who objected will be timely notified of the Director's decision.

Contact: James A. Nash; (202) 275-6864.

Noreta R. McGee,

Secretary.

[FR Doc. 90-3714 Filed 2-15-90; 8:45 am]

BILLING CODE 7035-01-M

[Finance Docket No. 31590]

**Notice of Exemption; The Nooksack Valley Railroad Company, Inc.—Acquisition Exemption—Line of Burlington Northern Railroad Company**

The Nooksack Valley Railroad Company, Inc. (Nooksack), a non-carrier, has filed a notice of exemption to acquire 11.27 miles of rail line owned by the Burlington Northern Railroad Company (BN).<sup>1</sup> The line is located between milepost 33.42, near Hamilton, and milepost 44.69, near Concrete, in Skagit County, WA. The transaction was expected to be consummated on or before February 15, 1990.<sup>2</sup>

Any comments must be filed with the Commission and served on Paul Kenna, President, The Nooksack Valley Railroad Company, Inc., PO Box 342, Deming, WA 98244.

Nooksack shall retain its interest in and take no steps to alter the historic integrity of all sites and structures on the line that are 50 years old or older

<sup>1</sup> Nooksack states that, upon consummation, The Skagit River Railroad Company (Skagit) will operate the line. As a separate entity, Skagit must obtain the necessary operating authority prior to commencing operations.

<sup>2</sup> In Docket No. AB-6 (Sub-No. 299X), *Burlington Northern Railroad Company—Abandonment Exemption—In Skagit County, WA* (not printed), served October 25, 1988, BN was exempted from the prior approval requirements of 49 U.S.C. 10903 to abandon this rail line. Subsequently, BN agreed to negotiate a trails use agreement. A Notice of Interim Trail Use or Abandonment (NITU), served December 19, 1988, gave the parties 180 days for negotiations. A 90-day extension was granted on January 9, 1990, and it expires on April 9, 1990. An appeal to the extension of the negotiating period is currently pending which raises, among other issues, the question of what effect this acquisition will have on trails use. This notice does not resolve that question.

until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470.<sup>3</sup>

This notice is filed under 49 CFR 1159.31. If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

Decided: February 13, 1990.

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

Noreta R. McGee,

Secretary.

[FR Doc. 90-3720 Filed 2-15-90; 8:45 am]

BILLING CODE 7035-01-M

**DEPARTMENT OF JUSTICE**

**Drug Enforcement Administration**

**Manufacturer of Controlled Substances; Application**

Pursuant to section 1301.43(a) of title 21 of the Code of Federal Regulations (CFR), this is notice that on September 8, 1989, Pharmaceuticals Division, Ciba-Geigy Corporation, Regulatory Compliance SEF 1030, 556 Morris Avenue, Summit, New Jersey made application to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of the Schedule II controlled substance methylphenidate (1724).

Any other such applicant and any person who is presently registered with DEA to manufacture such substances may file comments or objections to the issuance of the above application and may also file a written request for a hearing thereon in accordance with 21 CFR 1301.54 and in the form prescribed by 21 CFR 1316.47.

Any such comments, objections or request for a hearing may be addressed to the Deputy Assistant Administrator, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: DEA Federal Register Representative (CCR), and must be filed no later than March 19, 1990.

<sup>3</sup> Nooksack certifies that it has mailed copies of its notice to the Washington State Historic Preservation Officer stating there are no sites or structures 50 years old or older located on the right-of-way.

Dated: February 8, 1990.

Gene R. Haislip,

Deputy Assistant Administrator, Office of  
Diversion Control, Drug Enforcement  
Administration.

[FR Doc. 90-3676 Filed 2-15-90; 8:45 am]

BILLING CODE 4410-09-M

[Docket No. 89-45]

**Val Gene Tatum; d/b/a Val's  
Pharmacy, Los Angeles, California;  
Hearing**

Notice is hereby given that on May 30, 1989, the Drug Enforcement Administration, Department of Justice, issued to Val Gene Tatum, d/b/a Val's Pharmacy, an Order to Show Cause as to why the Drug Enforcement Administration should not revoke your DEA Certificate of Registration, AT0287816, and deny any pending applications for registration.

Thirty days have elapsed since the said Order to Show Cause was received by Respondent, and written request for a hearing having been filed with the Drug Enforcement Administration, notice is hereby given that a hearing in this matter will be held on Wednesday, February 21, 1990, commencing at 10 a.m., at the United States Tax Court, Federal Building, 880 Front Street, Room 4-S-19, San Diego, California.

Dated: February 9, 1990.

John C. Lawn,

Administrator, Drug Enforcement  
Administration.

[FR Doc. 90-3675 Filed 2-15-90; 8:45 am]

BILLING CODE 4410-09-M

[Docket Nos. 88-20, 88-21 and 88-22]

**Sam's Bennett Road Drugs, Inc., Sam's  
Orchard Drugs, Inc., Sam's Douglas  
Road Drugs, Inc., Revocation of  
Registrations**

This proceeding was initiated on February 2, 1988, when the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued Orders to Show Cause to Sam's Orchard Drugs, Inc.; Sam's Douglas Road Drugs, Inc.; and Sam's Bennett Road Drugs, Inc., hereinafter referred to as Respondents. The three pharmacies are located in Toledo, Ohio. The Orders sought to revoke the Respondent's DEA Certificates of Registration and to deny any pending applications for renewal. The statutory basis for the proposed action was that the Respondents' continued registration is inconsistent with the public interest as that term is used in 21 U.S.C. 823(f) and 824(a)(4).

Respondents, through counsel, requested a hearing on the issues raised by the Orders to Show Cause and the matter was placed on the docket of Administrative Law Judge Francis L. Young. Proceedings for the three pharmacies were consolidated and, following prehearing procedures, a hearing was held in Washington, DC, on January 6, 1989. On May 3, 1989, Judge Young issues his opinion and recommended findings of fact and conclusions of law. Exceptions were filed by Respondents and answered by Government Counsel. Judge Young transmitted the record of these proceedings to the Administrator. The record included the transcript, exhibits, exceptions and all pleadings filed by both parties. The Administrator has considered this record in its entirety and, pursuant to 21 CFR 1316.67, hereby issues his final order in this matter, based upon findings of fact and conclusions of law as hereinafter set forth.

At all relevant times, Gerald Cooper was and is the owner of Sam's Orchard Drugs, Inc.; Sam's Douglas Road Drugs, Inc.; and Sam's Bennett Road Drugs, Inc. In April 1983, the Ohio State Board of Pharmacy conducted an audit of Sam's Orchard Drugs, Inc. The audit covered the period of March 1, 1981, through April 25, 1983, and targeted the drug Talwin as well as Schedule II controlled substances. The investigators found discrepancies in the pharmacy's inventory. The audit revealed a shortage of 7,641 Talwin tablets. As part of the audit procedure, the Ohio State Board of Pharmacy investigators examined individual prescriptions. There were nine Talwin prescriptions for a single individual which were marked as having been refilled one time each by Mr. Cooper, although no refills had been authorized by the issuing physician. A prescription for another patient originally written for Valium, 10 milligrams, had been altered to read Talwin, 50 milligrams. The prescription was then refilled twice for Talwin by Mr. Cooper without proper authorization. On the back of a different Talwin prescription there was a notation, made by Mr. Cooper, that the prescription had been refilled five times from October 11, 1982, through November 19, 1982. The prescription, however, had been transferred to another pharmacy for filling on October 11, 1982, prior to any of the refills noted by Mr. Cooper. The prescription was never actually refilled by Mr. Cooper, yet he maintained a copy of the prescription in an attempt to cover his Talwin shortages.

A prescription issued to another patient for Transcopal had been altered to read Talwin, 50 milligrams. It was marked on the back as being refilled for Talwin 15 times. A prescription for a Schedule IV substance, such as Talwin, may lawfully be refilled five times in six months. 21 U.S.C. 829(b). During the course of the April 1983 audit, the Ohio State Board investigators observed Respondent taking prescriptions they had not yet reviewed and altering or adding refills to them. Respondent did this while the investigators were in the pharmacy conducting the audit. The investigation of Sam's Orchard Drugs, Inc. also revealed that the pharmacy was dispensing and charging for medication received as free samples. This is unlawful under Ohio law and is now violative of Federal law. The investigators discussed the results of their audit and investigation of the pharmacy with Mr. Cooper. He admitted that he had sold Talwin, without prescriptions, for \$50.00 per bottle. He was unable to give the total quantities he sold. Mr. Cooper also admitted to altering prescriptions.

As a result of the Ohio State Board of Pharmacy investigation, Respondent was criminally prosecuted and on December 5, 1983, pled no contest to the offenses of trafficking and illegally processing drug documents, both fourth degree felonies under Ohio law. On January 19, 1984, Mr. Cooper was sentenced to a term of imprisonment of one year for each offense, the sentences to be served concurrently, and was fined \$500.00 for each offense. Imposition of imprisonment was suspended and Mr. Cooper was placed on probation for two years in order to serve 200 hours of public service. The Ohio State Board of Pharmacy initiated administrative proceedings against Mr. Cooper and on January 12, 1984, suspended his pharmacy license for 24 months. A monetary penalty of \$3,000.00 was also imposed.

On February 1, 1984, approximately one month after his conviction, Mr. Cooper transferred his ownership interest in each of the three subject pharmacies to his wife, Ellen Cooper. After these transfers, Mrs. Cooper was the sole owner of each pharmacy. Mrs. Cooper paid her husband nothing for the exchange. The transfers were a pretense. Despite the transfers of formal ownership of the pharmacies and his lack of a state pharmacist license, Mr. Cooper continued to be deeply involved in directing the pharmacies' daily operations. He oversaw the day-to-day business of the pharmacies and assisted his wife and the pharmacists employed

during his suspension in setting pharmacy policy. Mrs. Cooper was not a pharmacist.

On February 17, 1984, Mrs. Cooper, as president of the three pharmacies, submitted applications for renewal of the Drug Enforcement Administration registrations. The applications question whether any officer, partner, stockholder or proprietor has ever been convicted of a felony involving controlled substances. Mrs. Cooper answered in the negative. Mrs. Cooper again submitted renewal applications in 1985 with the same response. But for the ownership transfer by gift from her husband, each renewal application should have indicated an affirmative response to this question.

Mr. Cooper's Ohio pharmacist license was reinstated in 1985. Mrs. Cooper died in May of 1986. All of her interests in the subject pharmacies passed by devise to Mr. Cooper, who once again became the sole owner of all three pharmacies.

While there are three separate Orders to Show Cause in this revocation proceeding, affecting three separate pharmacies, the evidence reveals wrongdoing in only one, Sam's Orchard Drugs, Inc. The record does not show any improprieties in either Sam's Bennett Road Drugs, Inc. or Sam's Douglas Road Drugs, Inc. Nevertheless, there is a common nucleus. All three were owned by Gerald Cooper. Wrongdoing by the owner at one of his locations necessarily impacts on his capability to maintain a registration consistent with the public interest in another.

The Drug Enforcement Administration has consistently held that the registration of a corporate registrant may be revoked upon a finding that a natural person who is an owner, officer, or key employee who has some responsibility for the operation of the registrant's controlled substance business, has been convicted of a felony offense relating to controlled substances. *Yazid M. Mahdi, d/b/a Greshan Road Pharmacy*, Docket No. 86-31, 51 FR 27267 (1986); *Ozie T. Faison, d/b/a Smith Discount Drugs*, Docket No. 85-37, 51 FR 16403 (1986).

The felony convictions of Mr. Cooper are undisputed and they comprise grounds for revocation of a registration. 21 U.S.C. 824(a)(1) also provides that a registration may be revoked if an application for registration has been materially falsified. While there was no material falsification in a technical sense, since in 1984 and 1985 Mrs. Cooper was the paper owner of the pharmacies, Mr. Cooper's transfer of formal ownership in these three pharmacies to his wife in 1984 was

plainly designed to mislead DEA registration officials by concealing important information. Mr. Cooper continued to be deeply involved in the pharmacies and effectively directed their operations. The change in ownership concealed from DEA the presence of a person exercising considerable control over the pharmacies; a person who had been convicted of multiple felonies involving controlled substances. Although affidavits were submitted attesting to Mr. Cooper's moral character and high degree of integrity, the administrative law judge found that they did not serve to balance or overcome the unlawful sales of Talwin by Mr. Cooper nor his subsequent efforts to deceive. The Administrator concurs in this judgement and adopts the administrative law judge's findings of fact and conclusions of law in their entirety.

For the reasons discussed above, the Administrator finds that the registration of these pharmacies is contrary to the public interest. Accordingly, pursuant to the authority vested in the Attorney General by 21 U.S.C. 824(a)(1), and delegated to the Administrator of the Drug Enforcement Administration by 28 CFR 0.100(b), the Administrator hereby orders that Certificates of Registration AS2872326, AS9740982 and AS2938960, previously issued to Sam's Bennett Road Drugs, Inc.; Sam's Orchard Road Drugs, Inc.; and Sam's Douglas Road Drugs, Inc., respectively, be, and they hereby are, revoked. The Administrator further orders that any pending applications for renewal of such registrations be, and they hereby are, denied.

This order is effective March 19, 1990.

Dated: February 9, 1990.

**John C. Lawn,**  
*Administrator.*

[FR Doc. 90-3677 Filed 2-15-90; 8:45 am]

BILLING CODE 4410-09-M

## DEPARTMENT OF LABOR

### Office of the Secretary

#### Agency Recordkeeping/Reporting Requirements Under Review by the Office of Management and Budget (OMB)

*Background:* The Department of Labor, in carrying out its responsibilities under the Paperwork Reduction Act (44 U.S.C. chapter 35), considers comments on the reporting and recordkeeping requirements that will affect the public.

*List of Recordkeeping/Reporting Requirements Under Review:* As necessary, the Department of Labor will publish a list of the Agency

recordkeeping/reporting requirements under review by the Office of Management and Budget (OMB) since the last list was published. The list will have all entries grouped into new collections, revisions, extensions, or reinstatements. The Departmental Clearance Office will, upon request, be able to advise members of the public of the nature of the particular submission they are interested in.

Each entry may contain the following information:

The Agency of the Department issuing this recordkeeping/reporting requirement.

The title of the recordkeeping/reporting requirement.

The OMB and Agency identification numbers, if applicable.

How often the recordkeeping/reporting requirement is needed.

Who will be required to or asked to report or keep records.

Whether small businesses or organizations are affected.

An estimate of the total number of hours needed to comply with the recordkeeping/reporting requirements and the average hours per respondent.

The number of forms in the request for approval, if applicable.

An abstract describing the need for and uses of the information collection.

*Comments and Questions:* Copies of the recordkeeping/reporting requirements may be obtained by calling the Departmental Clearance Officer, Paul E. Larson, telephone (202) 523-6331. Comments and questions about the items on this list should be directed to Mr. Larson, Office of Information Management, U.S. Department of Labor, 200 Constitution Avenue, NW., room N-1301, Washington, DC 20210. Comments should also be sent to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for (BLS/DM/ESA/ETA/OLMS/MSHA/OSHA/PWBA/VETS), Office of Management and Budget, room 3208, Washington, DC 20503 (Telephone (202) 395-6880).

Any member of the public who wants to comment on a recordkeeping/reporting requirement which has been submitted to OMB should advise Mr. Larsen of this intent at the earliest possible date.

#### New Collection:

Bureau of Labor Statistics.  
Multiple Worksite Report (ES-202 Program).

BLS 3202.  
Quarterly.

State or local governments; farms; businesses or others for profit; non-

profit institutions; small businesses or organizations.  
110,000 responses; 81,400 total hours; 22 minutes per response; 1 form.

The Multiple Worksite Report will be used by State Employment Security Agencies to collect information to disaggregate the employment and wages

for employers covered by Unemployment Insurance engaged in multiple operations within a State to their respective industries and/or geographical areas. These data are necessary to enhance the ES-202 Program which is used for sampling, benchmarking, and economic analysis.

This standardized form will replace fifty-three individually designed State forms currently in use.  
U.S. Department of Labor, Bureau of Labor Statistics; Office of Safety, Health and Working Conditions. Pilot studies of fatal occupational injuries.

Form No.	Affected public	Respondents	Frequency	Average time per response
Source documents..... BLS FOIS-1..... 2167 total hours.....	State and local agencies..... All.....	300 1100	6 (average/respondent) once.....	1 hour 20 min.

These pilot studies are an integral part to the proposed development of an improved system for deriving a comprehensive, national count of work-related deaths. The pilot studies, to be

conducted in two States, will test the implementation of a more timely data collection method and data validation procedures, utilizing all relevant information sources in the States.

*Extension*  
Employment and Training Administration.  
Nonmonetary Determinations Report.  
1205-0150; ETA 207.

Form No.	Affected public	Respondents	Frequency	Average time per response
ETA 207..... ETA 207..... 896 total hours.....	State Govt Local Govt.....	53 3	4..... 4.....	4 hours 4 hours

Data are used to monitor the impact of disqualification provisions, to measure workload, and to appraise adequacy and effectiveness of State and Federal nonmonetary determination procedures.

Signed at Washington, DC this 13th day of February, 1990.

Paul E. Larson,

*Departmental Clearance Officer.*

[FR Doc. 90-3722 Filed 2-15-90; 8:45 am]

BILLING CODE 4510-24-M

#### Employment Standards Administration, Wage and Hour Division

#### Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determination in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR part 1, Appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedeas decisions thereto, contain no expiration dates and are effective from their date of notice in the Federal Register, or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under The Davis-Bacon And Related Acts," shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration by the Department. Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor.

Employment Standards Administration, Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue, NW., Room S-3504, Washington, DC 20210.

**Supersedeas Decisions to General Wage Determination Decisions**

Volume III:  
Wyoming, WY90-3 ..... p.449, pp.450-452.

The numbers of the decisions being superseded and their date of notice in the **Federal Register** are listed with each State. Supersedeas decision numbers are in parentheses following the number of the decisions being superseded.

**Withdrawn General Wage Determination Decision**

This is to advise all interested parties that the Department of Labor is withdrawing, from the date of this notice, General Wage Determination No. MT90-2, dated February 16, 1990.

Agencies with construction projects pending to which this wage decision would have been applicable should utilize the project determination procedure by submitting a SF-308. See Regulations, part 1 (29 CFR), section 1.5. Contracts for which bids have been opened shall not be affected by this notice. Also consistent with 29 CFR 1.6(c)(2)(i)(A), the incorporation of the withdrawal decision in contract specifications, when the opening of bids is within ten (10) days of this notice, need not be affected.

**Modifications to General Wage Determination Decisions**

The numbers of the decisions listed in the Government Printing Office document entitled "General Wage Determination Issued Under the Davis-Bacon and Related Acts" being modified are listed by Volume, State, and page number(s). Dates of publication in the **Federal Register** are in parentheses following the decisions being modified.

Volume I:  
New York:  
NY90-1 (January 5, 1990). p.735, p.736.  
NY90-10 (January 5, 1990). p.831, p.832.  
Pennsylvania:  
PA90-4 (January 5, 1990). p.941, p.943.  
PA90-25 (January 5, 1990). p.1091, p.1092.  
West Virginia, WV90-2 (January 5, 1990). p.1391, p.1393, p.1396.  
Volume II:  
Illinois, IL90-2 (January 5, 1990). p.87, p.89.

Wisconsin, WI90-1 (January 5, 1990).	p.1157, p.1158.
Volume III: California, CA90-4 (January 5, 1990).	p.71, p.72-106.
Wyoming: WY90-2 (January 5, 1990).	p.443, p.448.
WY90-3 (January 5, 1990).	p.449, p.450-452.

**General Wage Determination Publication**

General wage determinations issued under the Davis-Bacon and Related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under the Davis-Bacon And Related Acts." This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across the country. Subscriptions may be purchased from:

Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 783-3238.

When ordering subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any or all of the three separate volumes, arranged by State. Subscriptions include an annual edition (issued on or about January 1) which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates will be distributed to subscribers.

Signed at Washington, DC, this 9th Day of February 1990.

Alan L. Moss,

Director, Division of Wage Determinations.

[FR Doc. 90-3526 Filed 2-15-90; 8:45 am]

BILLING CODE 4510-27-M

**Advisory Committee on Special Minimum Wages; Meeting**

A meeting of the Advisory Committee on Special Minimum Wages will be held in the Frances Perkins Building, Department of Labor, 200 Constitution Avenue, NW., Washington, DC, on March 19, 1990, starting at 2 p.m. in Rooms S4215 A, B, and C and will continue on March 20 and 21.

The mission of the Advisory Committee is to provide guidance to the Department regarding the administration and enforcement of the Fair Labor Standards Act (FLSA) and other Federal minimum wage laws as they relate to the employment of

individuals with disabilities whose productivity is impaired by those disabilities to the extent that these individuals are employed under certificates issued pursuant to section 14(c) of FLSA. Such certificates allow for employment at wage rates below the statutory minimum in order to prevent the curtailment of opportunities for employment.

The meeting will begin with an introduction to the FLSA including coverage, exemptions, government contracts, and investigation procedures, on Monday, March 19 at 2 p.m. The meeting will continue on March 20 and 21 with the following agenda items, among others, to be considered by the Committee:

- A review of the regulations (29 CFR part 525) governing the employment of workers with disabilities under special certificates;
- the employment of students in elementary and secondary schools under FLSA section 14(d);
- an overview of investigation findings;
- nontechnical pamphlets;
- the Washington State Pilot Project;
- supported employment and the role of the job coach;
- compliance issues in group homes;
- the poster for workers with disabilities;

Other items may be included on the agenda or introduced during the meeting.

The public is invited to attend this meeting. Written data, views, arguments pertaining to the business before the Advisory Committee, or additional agenda items are invited. Such data, views, arguments, or agenda items may be forwarded to the Advisory Committee Secretariat prior to the meeting or may be presented at the meeting.

Any inquiries concerning the meeting of the Advisory Committee may be directed to: Mr. Howard Ostmann, Secretariat for the Advisory Committee on Special Minimum Wages, Department of Labor, Room S3516, Frances Perkins Building, 200 Constitution Avenue, NW., Washington, DC 20210, telephone number (202) 523-8727. This is not a toll free telephone number.

Signed in Washington, DC, this Seventh (7th) day of February, 1990.

Nancy M. Flynn,  
*Acting Administrator.*

[FR Doc. 90-3631 Filed 2-15-90; 8:45 am]

BILLING CODE 4510-27-M

**Employment and Training  
Administration**

**Investigations Regarding  
Certifications of Eligibility To Apply for  
Worker Adjustment Assistance**

Petitions have been filed with the Secretary of Labor under section 221(a) of the Trade Act of 1974 ("the Act") and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Office of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to section 221(a) of the Act.

The purpose of each of the investigations is to determine whether

the workers are eligible to apply for adjustment assistance under title II, chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than February 26, 1990.

Interested persons are invited to submit written comments regarding the

subject matter of the investigations to the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than February 26, 1990.

The petitions filed in this case are available for inspection at the Office of the Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, 601 D Street, NW., Washington, DC 20213.

Signed at Washington, DC this 5th day of February 1990.

**Marvin M. Fooks,**  
*Director, Office of Trade Adjustment Assistance.*

**APPENDIX**

Petitioner: Union/workers/firm	Location	Date received	Date of petition	Petition No.	Articles produced
ACPC, Inc. (Workers)	Vancouver, WA	2/05/90	1/17/90	23,923	Aluminum Cables.
Ames Rubber Corp. (Company)	Hamburg, NJ	2/05/90	1/12/90	23,924	Automotive Products.
Blackstone Corp. (Company)	Jamestown, NY	1/29/90	1/18/90	23,925	Auto, Truck Radiators, & Heaters.
Brunswick Seat Co. (Company)	East Brunswick, NJ	1/29/90	1/17/90	23,926	Auto Seats.
Budd Co. (UAW)	Detroit, MI	2/05/90	1/23/90	23,927	Metal Stamping for Cars & Trucks.
Butoni Food Corp. (BC&TW)	S Hackensack, NJ	2/05/90	1/22/90	23,928	Pasta.
Chrysler Corp. (UAW)	Fenton, MO	2/05/90	1/24/90	23,929	Autos.
Crown Products (Iron & Bridge Wkers)	Stevens Point, WI	2/05/90	1/17/90	23,930	Sunshades for Tractors.
Eaton Controls Div. (Workers)	Carol Stream, IL	2/05/90	12/28/89	23,931	Automotive & Appliance Controls.
Fruehauf Trailer Operations (USWA)	Uniontown, PA	2/05/90	1/25/90	23,932	Tank Trailers.
Gilman Assembly Automation (IAMAW)	Janesville, WI	2/05/90	1/23/90	23,933	Auto Machinery.
General Motors-Ac Rochester (UAW)	Milwaukee, WI	2/05/90	1/26/90	23,934	Catalytic Converters.
General Motors-CPC Arlington (UAW)	Arlington, TX	2/05/90	1/18/90	23,935	Autos.
Haggards-Denison (USW)	Delaware, OH	2/05/90	1/15/90	23,936	Pumps, Valves, & Power Units.
Harvey Industries (IUE)	Athens, TX	2/05/90	1/25/90	23,937	TV & Stereos.
Howell Industries (USWA)	Masury, OH	2/05/90	1/26/90	23,938	Auto Stampings.
Jay Garment Co. (ACTWU)	Clarksville, TN	2/05/90	1/18/90	23,939	Workouts.
J.B. Ross, Inc. (Company)	New Brunswick, NJ	2/05/90	1/17/90	23,940	Furniture.
Kaiser Aluminum & Chemical Corp. (USWA)	Heath, OH	2/05/90	1/25/90	23,941	Aluminum Rod, Bar & Wire.
Kelsey-Hayes (Workers)	Sedalia, MO	2/05/90	1/19/90	23,942	Steel Automobile Wheels.
Kerry Petroleum Co. (Workers)	Midland, TX	2/05/90	1/18/90	23,943	Oil & Gas.
Knapp Shoes (Workers)	Brockton, MA	2/05/90	11/1/89	23,944	Shoes.
KWH Oil Co. & PNR Energy Corp. (Workers)	Dallas, TX	2/05/90	1/15/90	23,945	Oil & Gas.
Ladir Mfg. (ILGWU)	Union City, NJ	2/05/90	10/10/89	23,946	Formal Dresses.
L.J. Simone, Inc. (Workers)	Brooklyn, NY	2/05/90	1/22/90	23,947	Leather Shoes.
Masonite Corp. (IAMAW)	Cincinnati, OH	2/05/90	1/05/90	23,948	Wood Products.
Mayfield Mfg. Co., Inc. (Workers)	Mayfield, KY	2/05/90	1/25/90	23,949	Women's Wear.
Mineral Wells Mfg. (Workers)	Mineral Well, TX	2/05/90	1/22/90	23,950	Women's Blouses & Dresses.
Munsingwear, Inc. (ACTWU)	Ashland, WI	2/05/90	1/10/90	23,951	Men's Knitwear.
Munsingwear, Inc. (ACTWU)	Minneapolis, MN	2/05/90	1/10/90	23,952	Men's Knitwear.
New York Twist Drill Div. (Company)	Ramsey, NJ	2/05/90	1/25/90	23,953	Tools.
North American Refractories Co. (AB&GWI)	Curwensville, PA	2/05/90	1/22/90	23,954	Castings.
Rose Ellen Sportswear, Inc. (ILGWU)	Long Branch, NJ	2/05/90	1/24/90	23,955	Women's Jackets.
Swing N' Sway MFG, Inc. (Workers)	Brooklyn, NY	2/05/90	11/14/89	23,956	Ladies' Sportswear.
Tech Form Industries (USWA)	Shelby, OH	2/05/90	1/25/90	23,957	Exhaust Pipes.
Temple Mfg., Co. (Workers)	Temple, OK	2/05/90	1/15/90	23,958	Men's Pants.
Unisys Corp. (Workers)	Roseville, MN	2/05/90	1/21/90	23,959	Computers.
Unocal (Workers)	Nederland, TX	2/05/90	1/16/90	23,960	Oil & Gas.
Western Slope Refining Co. (Company)	Fruita, CO	2/05/90	1/22/90	23,961	Oil & Gas.
Western Slope Refining Co. (Company)	Denver, CO	2/05/90	1/22/90	23,962	Oil & Gas.
Wolverine Intl., Inc. (Company)	Bay City, MI	2/05/90	1/21/90	23,963	Women's Sleepwear.

**Mine Safety and Health Administration**

[Docket No. M-90-17-C]

**Quarto Mining Co.; Petition for Modification of Application of Mandatory Safety Standard**

Quarto Mining Company, 1800 Washington Road, Pittsburgh, Pennsylvania 15241 has filed a petition to modify the application of 30 CFR 75.1700 (oil and gas wells) to its Powhatan No. 4 Mine (I.D. No. 33-01157) located in Monroe County, Ohio. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirements that barriers be established and maintained around oil and gas wells penetrating coal beds not less than 300 feet in diameter.
2. As an alternate method, petitioner proposes to clean out and plug oil and gas wells using specific techniques and procedures as outlined in the petition.
3. In addition, petitioner proposes to mine through the plugged oil and gas well. Prior to mining through, the petitioner would confer with the MSHA District Manager for approval of the specific mining procedures, and appropriate officials would be allowed to observe the process and all mining would be under the direct supervision of a certified official.
4. Methane monitors would be calibrated prior to the shift and tests would be made during mining approximately every 10 minutes.
5. When the wellbore is interested, all equipment would be deenergized and safety checks would be made before mining would continue in by the well a sufficient distance to permit adequate ventilation around the area of the wellbore.
6. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that provided by the standard.

**Request for Comments**

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before March 19, 1990. Copies of the petition are available for inspection at that address.

Dated: February 7, 1990.

**Patricia W. Silvey,**  
*Director, Office of Standards, Regulations and Variances.*

[FR Doc. 90-3632 Filed 2-15-90; 8:45 am]

BILLING CODE 4510-43-M

[Docket No. M-90-16-C]

**Tunnelton Mining Co.; Petition for Modification of Application of Mandatory Safety Standard**

Tunnelton Mining Company, P.O. Box 367, Ebensburg, Pennsylvania 15931 has filed a petition to modify the application of 30 CFR 75.803(a) (protection of high-voltage circuits extending underground) to its Marion Mine (I.D. No. 36-00929) located in Indiana County, Pennsylvania. The petition is filed under section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that high-voltage equipment contain either a direct or derived neutral which is to be grounded through a suitable resistor at the source transformers, and grounding circuit, originating at the grounded side of the grounding resistor, be extended along with the power conductors and serve as the grounding conductor for the frames of all high-voltage equipment supplied power from that circuit.

2. As an alternate method, petitioner proposes that the grounding conductor which extends along with the power conductors for surface stationary high-voltage equipment be connected to the substation ground grid rather than at the grounding resistor which is connected to the isolated mine safety ground bed.

3. In support of this request, petitioner states that—

(a) The Pennsylvania State Mine Law prohibits connecting any loads other than the underground to the mine safety ground bed;

(b) The surface loads consist of two pad-mounted transformers which are located approximately 450 feet from the substation; and

(c) Connecting the surface loads to the station bed rather than the mine safety bed would minimize the possibility of elevating the underground equipment frames should lightning strike one of the surface structures.

4. Petitioner states that the proposed alternate method will provide the same degree of safety for the miners affected as that provided by the standard.

**Request for comments**

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mines Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All

comments must be postmarked or received in that office on or before March 19, 1990. Copies of the petition are available for inspection at that address.

Dated: February 6, 1990.

**Patricia W. Silvey,**  
*Director, Office of Standards, Regulations and Variances.*

[FR Doc. 90-3633 Filed 2-15-90; 8:45 am]

BILLING CODE 4510-43-M

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

[Notice 90-14]

**Aerospace Safety Advisory Panel; Meeting**

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Notice of meeting change.

**FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT:** 55FR2173, Notice Number 90-07, January 22, 1990.

**PREVIOUSLY ANNOUNCED TIMES AND DATES OF MEETING:** March 22, 1990, 1 p.m. to 2:30 p.m.

**CHANGES IN THE MEETING:** Dates changed to April 13, 1990, 2 p.m. to 3:30 p.m.

**CONTACT PERSON FOR MORE INFORMATION:**

**INFORMATION:** Mr. Gilbert L. Roth, Code Q-1, National Aeronautics and Space Administration, Washington, DC 20546, 202/453-8971.

Dated: February 12, 1990.

John W. Gaff,

*Advisory Committee Management Officer, National Aeronautics and Space Administration.*

[FR Doc. 90-3734 Filed 2-15-90; 8:45 am]

BILLING CODE 7510-01-M

**NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES****Meeting of the Design Arts Advisory Panel**

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), as amended, notice is hereby given that a meeting of the Design Arts Advisory Panel (Design Advancement Project Grants for Organizations/Program Grants to State & Regional Arts Agencies/Grants to Organizations Awarding Design Fellowships Section) to the National Council on the Arts will be held on March 8, 1990 from 9:00 a.m.—6:00 p.m.; March 7-8 from 9:00 a.m.—7:00 p.m.; and March 9 from 9:00 a.m.—1:00 p.m. in Room M14 of the

Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, D.C. 20506.

A portion of this meeting will be open to the public on March 6, 1990, from 9:00 a.m.—10:00 a.m. and on March 9 from 11:30 a.m.—1:00 p.m. The topics for discussion will be opening remarks and the application review process.

The remaining portions of this meeting on March 6, 1990, from 10:00 a.m.—6:00 p.m., on March 7–8 from 9:00 a.m.—7:00 p.m., and on March 9 from 9:00 a.m.—11:30 a.m. are for the purpose of Panel review, discussion, evaluation, and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency by grant applicants. In accordance with the determination of the Chairman published in the *Federal Register* of February 13, 1980, these sessions will be closed to the public pursuant to subsection (c)(4), (6) and (9)(B) of section 552b of title 5, United States Code.

If you need special accommodations due to a disability, please contact the Office of Special Constituencies, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, 202/682-5532, TTY 202/682-5496, at least seven (7) days prior to the meeting.

Further information with reference to this meeting can be obtained from Ms. Yvonne M. Sabine, Advisory Committee Management Officer, National Endowment for the Arts, Washington, DC 20506, or call 202/682-5433.

Dated: February 9, 1990.

**Yvonne M. Sabine,**  
Director, Council and Panel Operations,  
National Endowment for the Arts.

[FR Doc. 90-3704 Filed 2-15-90; 8:45 am]

BILLING CODE 7537-01-M

#### Meeting of the Music Advisory Panel

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), as amended, notice is hereby given that a meeting of the Music Panel (Music Recording Section) to the National Council on the Arts will be held on March 7, 1990, from 9:00 a.m.—5:30 p.m. and on March 8 from 9:00 a.m.—5:00 p.m. in room 714 at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

A portion of this meeting will be open to the public on March 8, 1990, from 3:34 p.m.—5:00 p.m. The topic for discussion will be guidelines review and policy issues.

The remaining portions of this meeting on March 7, 1990, from 9 a.m.—5:30 p.m. and March 8 from 9:00 a.m.—3:45 p.m. are for the purpose of Panel review, discussion, evaluation, and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended including information given in confidence to the agency by grant applicants. In accordance with the determination of the Chairman published in the *Federal Register* of February 13, 1980, these sessions will be closed to the public to subsection (c) (4), (6) and (9)(B) of section 552b of title 5, United States Code.

If you need special accommodations due to a disability, please contact the Office of Special Constituencies, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, 202/682-5532, TTY 202/682-5496, at least seven (7) days prior to the meeting.

Further information with reference to this meeting can be obtained from Ms. Yvonne M. Sabine, Advisory Committee Management Officer, National Endowment for the Arts, Washington, DC 20506, or call (202) 682-5433.

Dated: February 9, 1990.

**Yvonne M. Sabine,**  
Director, Council and Panel Operations,  
National Endowment for the Arts.

[FR Doc. 90-3705 Filed 2-15-90; 8:45 am]

BILLING CODE 7537-01-M

#### NUCLEAR REGULATORY COMMISSION

##### Privacy Act of 1974; Report of New System of Records

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Establishment of new system of records.

**SUMMARY:** The Nuclear Regulatory Commission (NRC) is proposing to establish a new system of Records, NRC-7, Telephone Call Detail Records. The NRC intends to establish a call detail program to help control the cost of operating its telephone system and to develop information about how the agency's telecommunications systems are being used.

**EFFECTIVE DATE:** The proposed new system of records will take effect, without further notice, on March 19, 1990, unless comments received on or before that date cause a contrary decision. If, based on NRC's review of

comments received, changes are made, NRC will publish a new final notice.

**ADDRESSES:** Send comments to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch. Copies of comments may be examined at the NRC Public Document Room, 2120 L Street, NW, Lower Level, Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Donnie H. Grimsley, Director, Division of Freedom of Information and Publications Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone: 301-492-7211.

**SUPPLEMENTARY INFORMATION:** NRC-7, Telephone Call Detail Records, has been developed in accordance with the OMB guidance published in the *Federal Register* on April 20, 1987. With the introduction of new government telecommunications systems employing time and distance billing versus established rate structures, i.e., FTS 2000 and the Washington Interagency Telecommunications System (WITS), cost control becomes increasingly important.

A report of this system of records, required by 5 U.S.C. 552a(o), as implemented by OMB Circular A-130, was sent to the Chairman, Committee on Government Operations, U.S. House of Representatives; the Chairman, Committee on Governmental Affairs, U.S. Senate; and the Office of Management and Budget on December 18, 1989. No comments were received on the proposed system of records.

1. The following new system of records, NRC-7, Telephone Call Detail Records—NRC, is being proposed for adoption by the NRC.

#### NRC-7

##### SYSTEM NAME:

Telephone Call Detail Records—NRC

##### SYSTEM LOCATION:

Office of Information Resources Management, NRC, 7735 Old Georgetown Road, Bethesda, Maryland.

##### CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals assigned telephone numbers by the NRC, including current and former NRC employees and contractors who make local or long-distance telephone calls and individuals who received telephone calls placed from NRC telephones.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Records relating to use of the agency telephones to place local or long-distance calls, records indicating assignment of telephone numbers to employees, and records relating to the location of telephones.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

42 U.S.C. 2201(1976).

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

Information in these records may be used:

- a. By individual employees of the agency to determine their individual responsibility for telephone calls; and
- b. For the routine uses specified in paragraphs 1, 3, 5, and 6 of the Prefatory Statement.

**Disclosures to consumer reporting agencies:**

*Disclosures pursuant to 5 U.S.C. 552a(b)(12):* Disclosures may be made from this system to "consumer reporting agencies" as defined in the Fair Credit Reporting Act (15 U.S.C. 1681a(f)) or the Federal Claims Collection Act of 1968 (31 U.S.C. 3701(a)(3)).

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:****STORAGE:**

Maintained in paper files, on computer tapes or disks.

**RETRIEVABILITY:**

Accessed by name, office, or telephone number.

**SAFEGUARDS:**

Maintained in lockable file cabinets or locked rooms. Computer files are password protected. Access to and use of these records are limited to those persons whose official duties require such access.

**RETENTION AND DISPOSAL:**

Records are destroyed after 5 years.

**SYSTEM MANAGER(S) AND ADDRESS:**

Chief, Telecommunications Branch, Office of Information Resources Management, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

**NOTIFICATION PROCEDURE:**

Director, Division of Freedom of Information and Publications Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

**RECORD ACCESS PROCEDURES:**

Same as "Notification procedure."

**CONTESTING RECORD PROCEDURES:**

Same as "Notification procedure."

**RECORD SOURCE CATEGORIES:**

Telephone assignment calls, call detail listing, results of administrative inquiries relating to assignment of responsibility for placement of specific telephone calls, and certification of telephone bills.

Dated at Rockville, MD, this 2nd day of February 1990.

For the Nuclear Regulatory Commission.

James L. Blaha,

*Acting Executive Director for Operations.*

[FR Doc. 90-3689 Filed 2-15-90; 8:45 am]

BILLING CODE 7590-01-M

For the Atomic Safety and Licensing Board.

Peter B. Bloch,

*Chair.*

Bethesda, Maryland

[FR Doc. 90-3691 Filed 2-15-90; 8:45 am]

BILLING CODE 7590-01-M

**Docket No. 50-602****University of Texas; Order Extending Construction Completion Date**

The University of Texas is the current holder of Construction Permit No. CPRR-123, issued by the Nuclear Regulatory Commission on June 4, 1985, for construction of the University of Texas TRIGA Mark II research reactor. The reactor facility is presently under construction at the Balcones Research Center in Austin, Texas.

On November 7, 1989, the University of Texas (UT or the applicant) filed a request for an extension of the completion date from December 31, 1989 to April 30, 1990. On November 27, 1989, the applicant requested a revision of the date requested in the earlier submittal to December 31, 1990. The extension has been requested because additional time is required to complete corrective work, including testing and inspection of some systems.

Good cause has been shown for the delay; the cause is beyond the control of the applicant; and the requested extension is for a reasonable period, the bases for which are set forth in the staff's evaluation of the request for extension.

Pursuant to 10 CFR 51.32, the Commission has determined that extending the construction completion date will have no significant impact on the environment (55 FR 4498 February 8, 1990).

The NRC staff safety evaluation of the request for extension of the construction permit is available for public inspection at the Commission's Public Document Room, Gelman Building, 2120 L Street NW., Washington, DC 20555.

It is hereby ordered that the latest completion date for Construction Permit No. CPRR-123 is extended from December 31, 1989 to December 31, 1990.

Date of issuance: February 9, 1990.

For the Nuclear Regulatory Commission.

Gary M. Holahan,

*Acting Director, Division of Reactor Projects—III, IV, V and Special Projects, Office of Nuclear Reactor Regulation.*

[FR Doc. 90-3690 Filed 2-15-90; 8:45 am]

BILLING CODE 7590-01-M

<sup>1</sup> See also § 2.751a

## NUCLEAR WASTE TECHNICAL REVIEW BOARD

### Meeting

The Nuclear Waste Technical Review Board (NWTRB), pursuant to its authority under section 5051 of Public Law 100-203, the Nuclear Waste Policy Amendments Act of 1987, will hold a meeting on March 2-3, 1990 at the Holiday Inn Broadway, 181 West Broadway Street, Tucson, Arizona, (602) 624-8711. The Board will meet from 8:30 a.m.-5:00 p.m. on March 2, and from 8:00 a.m.-12:00 p.m. on March 3.

The meeting will be closed to the public in order for the Board to discuss matters solely related to the internal personnel rules and practices of the Board and information of a personal nature, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

For further information, contact: Paula N. Alford, Director, External Affairs, Nuclear Waste Technical Review Board, 1111 18th Street NW., Suite 801, Washington, DC 20036, (202) 254-4792.

Dated: February 12, 1990.

William W. Coons,  
*Executive Director.*

[FR Doc. 90-3648 Filed 2-15-90; 8:45 am]

BILLING CODE 6820-AM-M

## SECURITIES AND EXCHANGE COMMISSION

### Self-Regulatory Organizations; Applications for Unlisted Trading Privileges and of Opportunity for Hearing; Pacific Stock Exchange, Inc.

February 12, 1990.

The above named national securities exchange has filed applications with the Securities and Exchange Commission ("Commission") pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f-1 thereunder for unlisted trading privileges in the following securities:

Berlitz International Ltd.

Common Stock, \$10 Par Value (File No. 7-5731)

Edisto Resources Corporation

Common Stock, \$.01 Par Value (File No. 7-5732)

First Brands Corp.

Common Stock, \$.10 Par Value (File No. 7-5733)

Global Utility Fund, Inc.

Common Stock, \$.01 Par Value (File No. 7-5734)

Nuveen Municipal Advantage Fund, Inc.

Common Stock, \$.01 Par Value (File No. 7-5735)

Patriot Premium Dividend Fund II

Common Stock, \$.01 Par Value (File No. 7-5736)

LSI Logic Corp.

Common Stock, No Par Value (File No. 7-5737)

Safecard Services, Inc.

Common Stock, \$.01 Par Value (File No. 7-5738)

Stratus Computer, Inc.

Common Stock, \$.01 Par Value (File No. 7-5739)

Polygram N.V.

Common Stock, NLG .50 (File No. 7-5740)

These securities are listed and registered on one or more other national securities exchange and are reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before March 6, 1990, written data, views and arguments concerning the above-referenced application. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, 450 5th Street NW., Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the application if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such applications are consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,  
*Secretary.*

[FR Doc. 90-3715 Filed 2-15-90; 8:45 am]

BILLING CODE 8010-01-M

### Self-Regulatory Organizations; Applications for Unlisted Trading Privileges and of Opportunity for Hearing; Philadelphia Stock Exchange, Inc.

February 12, 1990.

The above named national securities exchange has filed applications with the Securities and Exchange Commission ("Commission") pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f-1 thereunder for unlisted trading privileges in the following securities:

American Opportunity Income Fund, Inc.

Common Stock, \$.01 Par Value (File No. 7-5758)

Dreyfus Strategic Governments Income, Inc.

Common Stock, \$.0001 Par Value (File

No. 7-5759)

Kemper High Income Trust

Shares of Beneficial Interest, \$.01 Par Value (File No. 7-5760)

Kyocera Corporation

Common Stock, Y50 Par Value (File No. 7-5761)

The New Germany Fund, Inc.

Common Stock, \$.0001 Par Value (File No. 7-5762)

Nuveen Municipal Advantage Fund, Inc.

Common Stock, \$.01 Par Value (File No. 7-5763)

These securities are listed and registered on one or more other national securities exchange and are reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before March 6, 1990, written data, views and arguments concerning the above-referenced application. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, 450 5th Street NW., Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the application if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such applications are consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,  
*Secretary.*

[FR Doc. 90-3718 Filed 2-15-90; 8:45 am]

BILLING CODE 8010-01-M

### Self-Regulatory Organizations; Applications for Unlisted Trading Privileges and of Opportunity for Hearing; Cincinnati Stock Exchange, Inc.

February 12, 1990.

The above named national securities exchange has filed applications with the Securities and Exchange Commission ("Commission") pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f-1 thereunder for unlisted trading privileges in the following securities:

Kuhlan Corporation

Common Stock, \$1.00 Par Value (File No. 7-5741)

Energy Service Co.

Common Stock, \$.10 Par Value (File No. 7-5742)

Seitel, Inc.

Common Stock, \$.01 Par Value (File No. 7-5743)

Tofutti Brands

Common Stock, \$.01 Par Value (File No. 7-5744)

These securities are listed and registered on one or more other national securities exchange and are reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before March 6, 1990, written data, views and arguments concerning the above-referenced applications. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the applications if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such applications are consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

**Jonathan G. Katz,**  
Secretary.

[FR Doc. 90-3717 Filed 2-15-90; 8:45 am]

BILLING CODE 8010-01-M

**Self-Regulatory Organizations;  
Applications for Unlisted Trading  
Privileges and of Opportunity for  
Hearing; Midwest Stock Exchange, Inc.**

February 12, 1990.

The above named national securities exchange has filed applications with the Securities and Exchange Commission ("Commission") pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f-1 thereunder for unlisted trading privileges in the following securities:

Global Utility Fund, Inc.

Common Stock, \$1.00 Par Value (File No. 7-5745)

Western Mining Corp. Holding, Ltd.

American Depository Shares, No Par Value (File No. 7-5756)

American Healthcare Management

Common Stock, \$.01 Par Value (File No. 7-5747)

Hillhaven Corporation

Common Stock, \$.15 Par Value (File No. 7-5748)

Horsham Corp. (The)

Sub. Voting Shares, No Par Value (File No. 7-5749)

Valspar Corporation

Common Stock, \$.50 Par Value (File No. 7-5750)

ACM Managed Multi-Market Trust, Inc.

Common Stock, \$.01 Par Value (File No. 7-5751)

Robert Half International, Inc.

Common Stock, \$1.00 Par Vale (File No. 7-5752)

New Germany Fund, Inc. (The)

Common Stock, \$.001 Par Value (File No. 7-5753)

Luxottica Group, SPA

American Depository Shares, No Par Value (File No. 7-5754)

Taurus Muni California Holding, Inc.

Common Stock, \$.10 Par Value (File No. 7-5755)

Taurus Muni New York Holdings, Inc.

Common Stock, \$.10 Par Value (File No. 7-5756)

United Investors Management Co.

Non-Vot. Common Stock, \$1 Par Value (File No. 7-5757)

These securities are listed and registered on one or more other national securities exchange and are reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before March 6, 1990, written data, views and arguments concerning the above-referenced applications. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the applications if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such applications are consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

**Jonathan G. Katz,**  
Secretary.

[FR Doc. 90-3653 Filed 2-15-90; 8:45 am]

BILLING CODE 8010-01-M

**DEPARTMENT OF TRANSPORTATION**

**Coast Guard**

[CGD 90-006]

**Areas To Be Avoided Off the Coast of Florida**

**AGENCY:** Coast Guard, DOT.

**ACTION:** Announcement of public meetings; request for comments.

**SUMMARY:** The Coast Guard intends to submit a proposal to the International Maritime Organization (IMO) to establish areas to be avoided off the Florida coast to attempt to prevent larger vessels from running aground and damaging the coral reefs. IMO is the international body responsible for establishing and recommending measures on an international level concerning ships' routing. The Coast Guard will hold public meetings to discuss the proposal as described below on the dates and at the locations specified. The meetings are to gather information and public views on the proposal. All comments will be considered in finalizing the proposal that is presented to IMO.

**ADDRESSES:** Written comments must be received by March 15, 1990. They should be mailed to Commandant (G-NSR-3), U.S. Coast Guard, 2100 Second Street SW., Washington, DC 20593-0001, ATTN: Margie Hegy.

**Meeting Information**

Miami, Florida—Tuesday, March 6, 1990, Miami Convention Center, Hyatt Regency Hotel, 400 S.E. 2nd Avenue, Miami, FL 33131; Telephone Number (305) 358-1234

Key West, Florida—Thursday, March 8, 1990, Convention Center, Holiday Inn Beachside Resort, 1111 N. Roosevelt Blvd., Key West, FL 33040; Telephone Number (305) 294-25711.

**FOR FURTHER INFORMATION CONTACT:** Margie G. Hegy, Project Manager, Short Range Aids to Navigation Division, Office of Navigation Safety and Waterway Services (G-NSR-3), Phone (202) 267-0415.

**SUPPLEMENTARY INFORMATION:** Two meetings will be held at each location, the first starting at 1:00 p.m. and continuing until the last speaker is heard or 4:00 p.m. The second meeting at each location will begin at 7:00 p.m. and continue until the last speaker is heard.

Interested persons are invited to participate in these meetings. Those wishing to make an oral statement should register by February 28, 1990. To register, call LTjg Michelle Kane, Seventh Coast Guard District (oan) Office, Miami, FL at (305) 350-5722 or Margie Hegy, Coast Guard Headquarters, Washington, DC at (202) 267-0415. Oral statements by individuals without prior registration will be allowed only if time permits.

**Background**

As a result of the EXXON VALDEZ incident in Alaska and the recent vessel groundings in the Florida Keys, the Coast Guard intends to submit a proposal to IMO in June 1990 designating areas to be avoided along the Florida Keys. An "Area to be Avoided", as defined in IMO's *Ships' Routing Guide*, is "a routing measure comprising an area within defined limits in which either navigation is particularly hazardous or it is exceptionally important to avoid casualties and which should be avoided by all ships, or certain classes of ships." IMO approved areas to be avoided are marked on charts and referred to in notes on the chart. They are advisory and voluntary. However, adoption by IMO constitutes agreement by member governments that they intend for ships of their registry to respect the requirements of an area to be avoided. As a practical matter, professional mariners are attentive to charted information and are likely to observe charted cautions.

**Description**

The Coast Guard is considering establishing three areas to be avoided off the Florida coast as depicted on Figure 1. While not to scale, the diagram shows the areas under consideration which are described verbally and by geographic coordinates below.

Vessels to be excluded from these three areas to be avoided are all vessels carrying cargoes of oil or hazardous material and all other vessels of 500 gross tons or over.

In general, the first area under consideration is slightly shoreward of the 100 fathom curve, approximately 5 nautical miles off the reef line, from near the northern boundary of Biscayne National Park to Key West. Key West Harbor Main Ship Channel, Key West anchorage areas, access to Boca Chica, and Key West Northwest Channel would not be included in the area to be avoided. The inshore boundary east and north of Key West generally follows the Territorial Sea Baseline. This includes Hawk Channel, which extends inside the reef line from just south of Biscayne Bay to Key West.

The second area to be avoided would encompass Rebecca Shoal, Halfmoon Shoal, and the western end of the area

known as "New Ground" and Marquesas Keys.

The third area to be avoided, in the vicinity of the Dry Tortugas, would coincide with the existing buoys around the Fort Jefferson National Monument.

The geographic coordinates, based on North American 1927 Datum, are as follows:

**Area I—Key Biscayne National Monument to Key West**

	<i>Latitude</i>	<i>Longitude</i>
(1)	25°39.18' N	080°09.10' W
(2)	25°38.64' N	080°08.05' W
(3)	25°38.70' N	080°02.70' W
(4)	25°22.00' N	080°03.00' W
(5)	25°00.20' N	080°13.40' W
(6)	24°37.90' N	089°47.30' W
(7)	24°29.20' N	081°17.30' W
(8)	24°22.50' N	081°42.50' W
(9)	24°27.50' N	081°47.80' W
(10)	24°31.00' N	081°48.10' W
(11)	12°31.90' N	081°45.55' W
(12)	24°31.90' N	081°43.90' W
(13)	24°33.50' N	081°43.17' W
		(14) and thence east and north along the Territorial Sea Baseline to
(15)	25°35.44' N	080°09.66' W

and thence to the point of beginning.

**Area II—West of Key West to Rebecca Shoal**

	<i>Latitude</i>	<i>Longitude</i>
(1)	24°27.50' N	081°48.30' W
(2)	24°23.00' N	081°53.10' W
(3)	24°23.00' N	082°27.80' W

(4)	24°34.50' N	082°37.50' W
(5)	24°43.00' N	082°26.50' W
(6)	24°38.30' N	081°54.10' W
(7)	24°37.90' N	081°53.80' W
(8)	24°36.18' N	081°51.80' W
(9)	24°34.50' N	081°50.60' W
(10)	24°33.45' N	081°49.70' W
(11)	24°31.40' N	081°51.80' W
(12)	24°30.00' N	081°51.50' W
(13)	24°30.00' N	081°49.90' W
(14)	24°31.20' N	081°49.00' W
(15)	24°31.40' N	081°48.80' W
(16)	24°30.80' N	081°48.30' W

and thence to the point of beginning.

**Area III—Dry Tortugas/Fort Jefferson National Park**

	<i>Latitude</i>	<i>Longitude</i>
(1)	24°34.00' N	082°54.00' W
(2)	24°34.00' N	082°58.00' W
(3)	24°39.00' N	082°58.00' W
(4)	24°43.00' N	082°54.00' W
(5)	24°43.50' N	082°52.00' W
(6)	24°43.50' N	082°48.00' W
(7)	24°42.00' N	082°46.00' W
(8)	24°40.00' N	082°46.00' W
(9)	24°37.00' N	082°48.00' W

and thence to the point of beginning.

Dated: February 8, 1990.

R.T. Nelson,

*Rear Admiral, U.S. Coast Guard, Chief, Office of Navigation Safety and Waterway Services.*

BILLING CODE 4910-14-M

**NOTIFICATION TO THE UNITED STATES**

REAGAN

REED

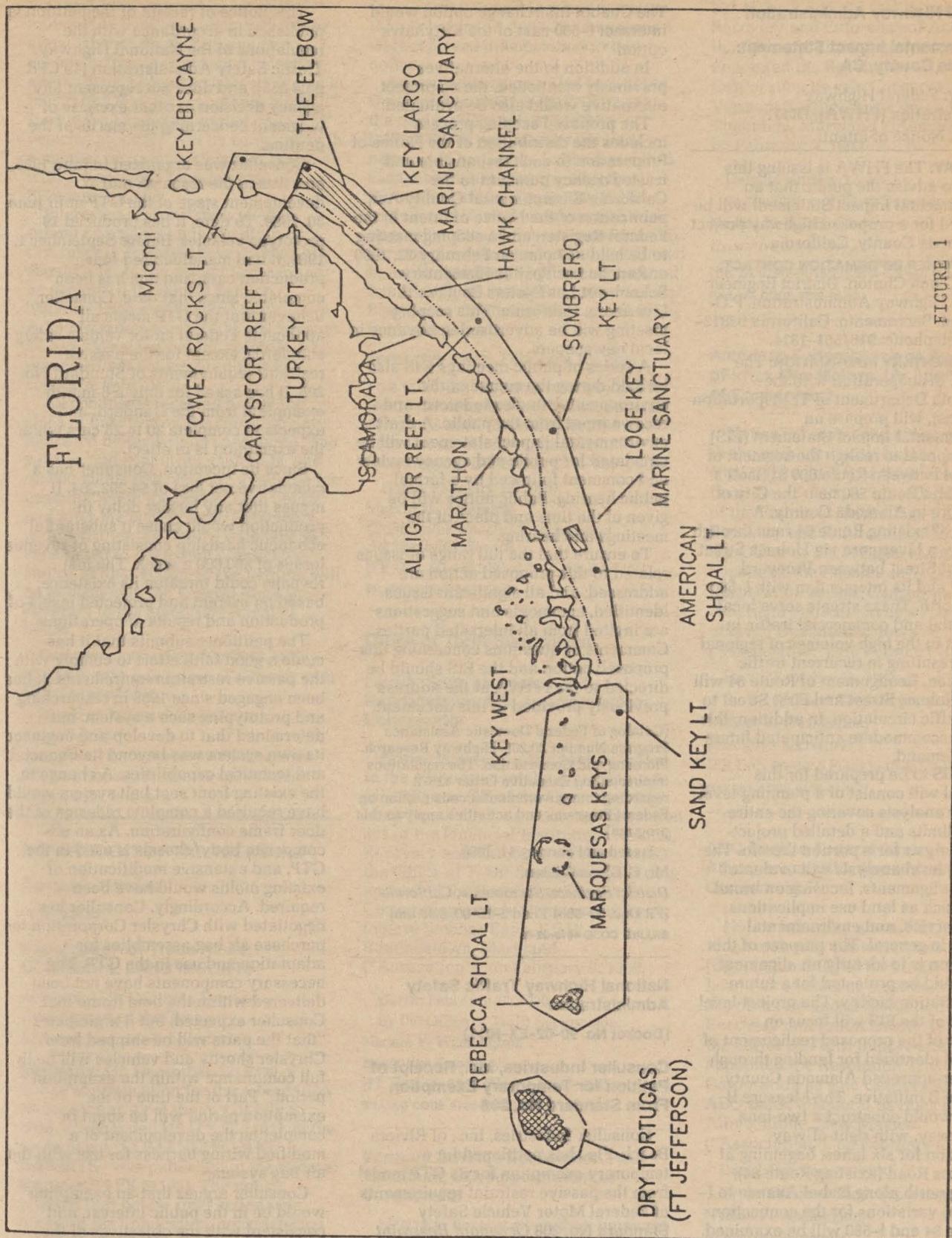


FIGURE 1

**Federal Highway Administration****Environmental Impact Statement:  
Alameda County, CA**

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice of intent.

**SUMMARY:** The FHWA is issuing this notice to advise the public that an Environmental Impact Statement will be prepared for a proposed highway project in Alameda County, California.

**FOR FURTHER INFORMATION CONTACT:**  
Mr. C. Glenn Clinton, District Engineer, Federal Highway Administration, P.O. Box 1915, Sacramento, California 95812-1915. Telephone: 916/551-1314.

**SUPPLEMENTARY INFORMATION:** The FHWA, in cooperation with the California Department of Transportation (Caltrans), will prepare an Environmental Impact Statement (EIS) on a proposal to realign the segment of Route 84 between Route 680 at Scott's Corner and Route 580 near the City of Livermore in Alameda County. A portion of existing Route 84 runs through downtown Livermore via Holmes Street and First Street between Vineyard Avenue and its intersection with I-580 to the north. These streets serve local residential and commercial traffic in addition to the high volumes of regional traffic, resulting in recurrent traffic congestion. Realignment of Route 84 will return Holmes Street and First Street to local traffic circulation. In addition, this would accommodate anticipated future traffic demand.

The EIS to be prepared for this proposal will consist of a planning-level corridor analysis covering the entire project limits and a detailed project-level analysis for a portion therein. The corridor-level analysis will evaluate various alignments, focusing on broad issues such as land use implications, traffic service, and environmental impacts in general. The purpose of this evaluation is to identify an alignment that should be protected for a future transportation facility. The project-level element of the EIS will focus on a segment of the proposed realignment of Route 84 identified for funding through the voter-approved Alameda County Measure B initiative. The Measure B project would construct a two-lane expressway, with right-of-way acquisition for six lanes, beginning at Vallecitos Road (existing Route 84), heading north along Isabel Avenue to I-580. Two variations for the connection of Route 84 and I-580 will be examined. The Kittyhawk Interchange option would intersect I-580 halfway between Airway Boulevard and Portola Avenue.

The Chabot Interchange option would intersect I-580 east of the Kittyhawk option.

In addition to the alternatives previously mentioned, the no project alternative would also be evaluated.

The proposed scoping process includes the distribution of the Notice of Preparation to each responsible and trustee agency pursuant to the California Environmental Quality Act, publication of the Notice of Intent in the *Federal Register*, and a scoping meeting to be held at 7 p.m. on February 22, 1990 at Rancho Las Positas Elementary School, 401 Las Positas Boulevard, Livermore, California. This scoping meeting will be advertised in advance in local newspapers.

A series of public meetings will also be held during the course of the environmental studies to inform and receive input from the public. A draft environmental impact statement will be circulated for public and agency review and comment followed by a formal public hearing. Public notice will be given of the time and place of the meetings and hearing.

To ensure that the full range of issues related to this proposed action are addressed, and all significant issues identified, comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to the FHWA at the address previously provided in this document.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal Programs and activities apply to this program)

Issued on February 11, 1990.

Mr. C. Glenn Clinton,  
*District Engineer, Sacramento, California.*  
[FR Doc. 90-3661 Filed 2-15-90; 8:45 am]

BILLING CODE 4910-22-M

**National Highway Traffic Safety Administration**

[Docket No. 90-02-EX-NO1]

**Consulier Industries, Inc.; Receipt of Petition for Temporary Exemption From Standard No. 208**

Consulier Industries, Inc., of Riviera Beach, Fla., has petitioned for a temporary exemption for its GTP model from the passive restraint requirements of Federal Motor Vehicle Safety Standard No. 208 *Occupant Restraint Systems*. The basis of the petition is that compliance would cause it substantial economic hardship.

This notice of receipt of the petition is published in accordance with the regulations of the National Highway Traffic Safety Administration (49 CFR part 555), and does not represent any agency decision or other exercise of judgment concerning the merits of the petition.

Consulier was organized in June 1985, and was in the research and development stage of the GTP until June 30, 1989. To date, it has produced 19 prototype vehicles. Before September 1, 1989, it had manufactured four production cars, and one has been completed since that date. Consulier believes that the GTP meets all applicable Federal motor vehicle safety standards, except for the passive restraint requirements of Standard No. 208. It has asked for only a 6-month exemption from the standard, and expects to complete 20 to 25 cars while the exemption is in effect.

Since its inception, Consulier has a cumulative net loss of \$4,292,364. It argues that any further delay in production would cause it substantial economic hardship consisting of revenue losses of \$60,000 a week. The lost revenue could threaten its existence, based on current and projected levels of production and results of operations.

The petitioner submits that it has made a good faith effort to comply with the passive restraint requirements. It has been engaged since 1988 in researching and prototyping such a system, but determined that to develop and engineer its own system was beyond its financial and technical capabilities. A change in the existing front seat belt system would have required a complete redesign of the door frame configuration. As an all-composite body/chassis is used in the GTP, and extensive modification of existing molds would have been required. Accordingly, Consulier has negotiated with Chrysler Corporation to purchase air bag assemblies for adaptation and use in the GTP. The necessary components have not been delivered within the time frame that Consulier expected, but it anticipates "that the parts will be shipped from Chrysler shortly and vehicles will be in full compliance within the exemption period." Part of the time of the exemption period will be spent in completing the development of a modified wiring harness for use with the air bag system.

Consulier argues that an exemption would be in the public interest, and consistent with the objectives of the National Traffic and Motor Vehicle Safety Act. It is the type of small manufacturer (50 employees) for which

the temporary exemption authority is intended to help. An exemption would allow "the production of a unique vehicle increasing consumer selection alternatives, at least to a small degree in the limited two-seat sport car market." During the exemption period, the vehicles produced will be equipped with a manual restraint system that complies with the previous requirements of Standard No. 208.

Interested persons are invited to submit comments on the petition of Consulier described above. Comments should refer to the docket number and be submitted to: Docket Section, National Highway Traffic Safety Administration, Room 5109, 400 Seventh St. SW., Washington, DC 20590. It is requested but not required that five copies be submitted.

All comments received before the close of business on the comment date indicated below will be considered. The petition and supporting materials, and all comments received, are available for examination in the docket both before and after the closing date. Comments received after the closing date will be considered to the extent practicable. Notice of final action on the petition will be published in the *Federal Register* pursuant to the authority indicated below.

Comment closing date: March 19, 1990.  
(15 U.S.C. 1410; delegations of authority at 49 CFR 1.50 and 501.8)

Issued on February 13, 1990.

Barry Felrice,

*Associate Administrator for Rulemaking.*  
[FR Doc. 90-3692 Filed 2-15-90; 8:45 am]

BILLING CODE 4910-59-M

#### DEPARTMENT OF THE TREASURY

##### Customs Service

[T.D. 90-14]

##### Recordation of Trade Name; COMANCHE LAND IMPORTS

AGENCY: U.S. Customs Service,  
Department of the Treasury.

ACTION: Notice of recordation.

SUMMARY: On December 12, 1989, a notice of application for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "COMANCHE LAND IMPORTS" was published in the *Federal Register* (54 FR 51103). The notice advised that before final action was taken on the application, consideration would be given to any relevant data, views, or arguments submitted in writing by any person in opposition to

the recordation and received not later than February 12, 1990. No responses were received in opposition to the notice.

Accordingly, as provided in § 133.14, Customs Regulations (19 CFR 133.14), the name "COMANCHE LAND IMPORTS" is recorded as the trade name used by George L. Murray, d/b/a Comanche Land Imports, 3819 San Bernardo, Laredo, Texas 78041. The trade name is used in connection with original statues which are reproduced in various plants in Mexico and distributed in the United States by Comanche Land Imports. There are no foreign persons or businesses authorized or licensed to use the trade name.

EFFECTIVE DATE: February 16, 1990.

FOR FURTHER INFORMATION CONTACT:  
Bettie Coombs-Spivey, Value, Special Programs and Admissibility Branch,  
1301 Constitution Avenue NW.,  
Washington, DC 20229, (202-566-5765).

Dated: February 12, 1990.

Marvin M. Amernick,  
*Chief, Value, Special Programs and Admissibility Branch.*

[FR Doc. 90-3662 Filed 2-15-90; 8:45 am]

BILLING CODE 4820-02-M

#### Office of Thrift Supervision

##### Liberty Savings Bank, F.S.B., Randallstown, MD; Appointment of Conservator

Notice is hereby given that, pursuant to the authority contained in section 5 (d)(2)(B) and (H) of the Home Owners' Loan Act of 1933, as amended by section 301 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, the Office of Thrift Supervision has duly appointed the Resolution Trust Corporation as sole Conservator for Liberty Savings Bank, F.S.B., Randallstown, Maryland ("Association"), on February 9, 1990.

Dated: February 12, 1990.

By the Office of Thrift Supervision.  
Nadine Y. Washington,  
*Executive Secretary.*

[FR Doc. 90-3638 Filed 2-15-90; 8:45 am]

BILLING CODE 6720-01-M

##### Vermont Savings Association F.A., Timonium, MD; Appointment of Conservator

Notice is hereby given that, pursuant to the authority contained in section 5 (d)(2)(B) and (H) of the Home Owners' Loan Act of 1933, as amended by section

301 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, the Office of Thrift Supervision has duly appointed the Resolution Trust Corporation as sole Conservator for Vermont Savings Association F.A., Timonium, Maryland ("Association"), on February 9, 1990.

Dated: February 12, 1990.

By the Office of Thrift Supervision.  
Nadine Y. Washington,  
*Executive Secretary.*

[FR Doc. 90-3639 Filed 2-15-90; 8:45 am]

BILLING CODE 6720-01-M

#### American Federal Savings Association of Iowa, Des Moines, IA; Appointment of Conservator

Notice is hereby given that, pursuant to the authority contained in section 5(d)(2)(B) and (H) of the Home Owners' Loan Act of 1933, as amended by § 301 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, the Office of Thrift Supervision has duly appointed the Resolution Trust Corporation as sole Conservator for American Federal Savings Association of Iowa, Des Moines, Iowa ("Association"), on February 9, 1990.

Dated: February 12, 1990.

By the Office of Thrift Supervision.  
Nadine Y. Washington,  
*Executive Secretary.*

[FR Doc. 90-3635 Filed 2-15-90; 8:45 am]

BILLING CODE 6720-01-M

#### ABQ Bank, a Federal Savings Bank, Albuquerque, NM; Appointment of Conservator

Notice is hereby given that, pursuant to the authority contained in section 5 (d)(2)(A) and (B) of the Home Owners' Loan Act of 1933, as amended by section 301 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, the Office of Thrift Supervision has duly appointed the Resolution Trust Corporation as sole Conservator for ABQ Bank, a Federal Savings Bank, Albuquerque, New Mexico ("Association"), on February 9, 1990.

Dated: February 12, 1990.

By the Office of Thrift Supervision.  
Nadine Y. Washington,  
*Executive Secretary.*

[FR Doc. 90-3636 Filed 2-15-90; 8:45 am]

BILLING CODE 6720-01-M

**Fairmont Federal Savings Association,  
Fairmont, MN; Appointment of  
Conservator**

Notice is hereby given that, pursuant to the authority contained in section 5 (d)(2)(B) and (H) of the Home Owners' Loan Act of 1933, as amended by section 301 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, the Office of Thrift Supervision has duly appointed the Resolution Trust Corporation as sole Conservator for Fairmont Federal Savings Association, Fairmont, Minnesota ("Association"), on February 8, 1990.

Dated: February 12, 1990.

By the Office of Thrift Supervision.

Nadine Y. Washington,  
*Executive Secretary.*

[FR Doc. 90-3637 Filed 2-15-90; 8:45 am]

BILLING CODE 6720-01-M

**Fairmont Federal Savings and Loan  
Association, Fairmont, MN;  
Appointment of Receiver**

Notice is hereby given that, pursuant to the authority contained in section 5 (d)(2)(A) of the Home Owners' Loan Act of 1933, as amended by section 301 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, the Office of Thrift Supervision has duly appointed the Resolution Trust Corporation as sole Receiver for Fairmont Federal Savings and Loan Association, Fairmont, Minnesota ("Association"), on February 8, 1990.

Dated: February 12, 1990.

By the Office of Thrift Supervision.

Nadine Y. Washington,  
*Executive Secretary.*

[FR Doc. 90-3643 Filed 2-15-90; 8:45 am]

BILLING CODE 6720-01-M

**Vermont Federal Savings and Loan  
Association, Timonium, MD;  
Appointment of Receiver**

Notice is hereby given that, pursuant to the authority contained in section 5 (d)(2)(A) and (B) of the Home Owners' Loan Act of 1933, as amended by section 301 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, the Office of Thrift Supervision has duly appointed the Resolution Trust Corporation as sole Receiver for Vermont Federal Savings and Loan Association, Timonium, Maryland ("Association"), on February 9, 1990.

Dated: February 12, 1990.

By the Office of Thrift Supervision.

Nadine Y. Washington,  
*Executive Secretary.*

[FR Doc. 90-3645 Filed 2-15-90; 8:45 am]

BILLING CODE 6720-01-M

[LN-4/1]

**Community Savings & Loan  
Association, Fond du Lac, WI;  
Appointment of Receiver**

Notice is hereby given that, pursuant to the authority contained in section 5 (d)(2)(F) of the Home Owners' Loan Act of 1933, as amended by section 301 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, the Office of Thrift Supervision has duly appointed the Resolution Trust Corporation as sole Receiver for Community Savings and Loan Association, Fond du Lac, Wisconsin ("Association") on February 9, 1990.

Dated: February 12, 1990.

By the Office of Thrift Supervision.

Nadine Y. Washington,  
*Executive Secretary.*

[FR Doc. 90-3644 Filed 2-15-90; 8:45 am]

BILLING CODE 6720-01-M

# Sunshine Act Meetings

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

## NATIONAL MEDIATION BOARD

Agency Meeting.

**TIME AND DATE:** 2 p.m., Wednesday, March 7, 1990.

**PLACE:** Board Hearing Room, 8th Floor, 1425 K. Street NW., Washington, DC.

**STATUS:** Open.

### MATTERS TO BE CONSIDERED:

1. Ratification of the Board actions taken by notation voting during the month of February, 1990.

2. Other priority matters which may come before the Board for which notice will be given at the earliest practicable time.

**SUPPLEMENTARY INFORMATION:** Copies of the monthly report of the Board's notation voting actions will be available from the Executive Director's office following the meeting.

### CONTACT PERSON FOR MORE INFORMATION:

Mr. Charles R. Barnes, Executive Director, Tel: (202) 523-5920.

Date of Notice: February 12, 1990.

Charles R. Barnes,

*Executive Director, National Mediation Board.*

[FR Doc. 90-3838 Filed 2-14-90; 1:29 pm]

BILLING CODE 7550-01-M

## RESOLUTION TRUST CORPORATION

### NOTICE OF AGENCY MEETING

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that on Tuesday, February 13, 1990, at 2:52

p.m., the Board of Directors of the Resolution Trust Corporation met in closed session to consider certain matters relating to the management of a thrift institution in conservatorship.

In calling the meeting, the Board determined, on motion of Director C. C. Hope, Jr. (Appointive), seconded by Director Robert L. Clarke (Comptroller of the Currency), concurred in by Director M. Danny Wall, (Director of the Office of Thrift Supervision), and Chairman L. William Seidman, that Corporation business required its consideration of the matters on less than seven days notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(9)(A)(ii) and (c)(9)(B) of the "Government in the Sunshine Act" (5 U.S.C. 552b (c)(9)(A)(ii) and (c)(9)(B)).

The meeting was held in the Board Room of the FDIC Building located at 550—17th Street, NW., Washington, DC.

Dated: February 13, 1990.

Resolution Trust Corporation.

John M. Buckley, Jr.,

*Executive Secretary.*

[FR Doc. 90-3843 Filed 2-14-90; 1:31 pm]

BILLING CODE 6714-01-M

## SECURITIES AND EXCHANGE COMMISSION

### Agency Meeting

**"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT:** 55 FR 4305 February 7, 1990.

Federal Register

Vol. 55, No. 33

Friday, February 16, 1990

**STATUS:** Open/closed meeting.

**PLACE:** 450 Fifth Street, NW., Washington, DC.

**DATE PREVIOUSLY ANNOUNCED:** Friday, February 2, 1990.

### CHANGE IN THE MEETING: Deletions.

The following item will not be considered at an open meeting scheduled for Wednesday, February 14, 1990, 2 p.m.

The Commission will hear oral argument on an appeal by Thomas J. Fittin, Jr., formerly president and principal shareholder of Fittin, Cunningham & Lauzon, a registered broker-dealer, from an administrative law judge's initial decision. For further information, please contact R. Moshe Simon at (202) 272-7400.

The following item will not be considered at a closed meeting scheduled for Wednesday, February 14, 1990, following the 2 p.m. open meeting:

Post oral argument discussion.

Commissioner Flesichman, as duty officer, determined that Commission business required the above changes.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: David Underhill at (202) 272-2100.

Dated: February 13, 1990.

Jonathan G. Katz,

*Secretary.*

[FR Doc. 90-3839 Filed 2-14-90; 1:30 pm]

BILLING CODE 8010-01-M

## Corrections

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

### DEPARTMENT OF AGRICULTURE

#### Agricultural Marketing Service

#### 7 CFR Part 1002

[Docket No. AO-71-A77; DA-88-105]

#### Milk in the New York-New Jersey Marketing Area; Order Amending Order

#### *Correction*

In rule document 90-2180 beginning on page 3198 in the issue of Wednesday,

January 31, 1990, make the following correction:

#### § 1002.50a [Corrected]

On page 3199, in the third column, in § 1002.50a, in the seventh line, insert "in" before "§ 1002.51".

BILLING CODE 1505-01-D

### Federal Register

Vol. 55, No. 33

Friday, February 16, 1990

last line, "34s/32s" should read "34<sup>s</sup>/32<sup>s</sup>".

BILLING CODE 1505-01-D

### DEPARTMENT OF ENERGY

#### Federal Energy Regulatory Commission

[Docket Nos. TQ90-5-5-000, RP89-35-007]

#### Midwestern Gas Transmission Co.; Filing To Implement Settlement Rates, Track Changes in Supplier Rates and Modify Tariff Sheets Pursuant to Commission Orders

#### *Correction*

In notice document 90-3334 beginning on page 5062 in the issue of Tuesday, February 13, 1990, make the following correction:

On page 5062, in the second column, the docket numbers should read as set forth above.

BILLING CODE 1505-01-D

### DEPARTMENT OF COMMERCE

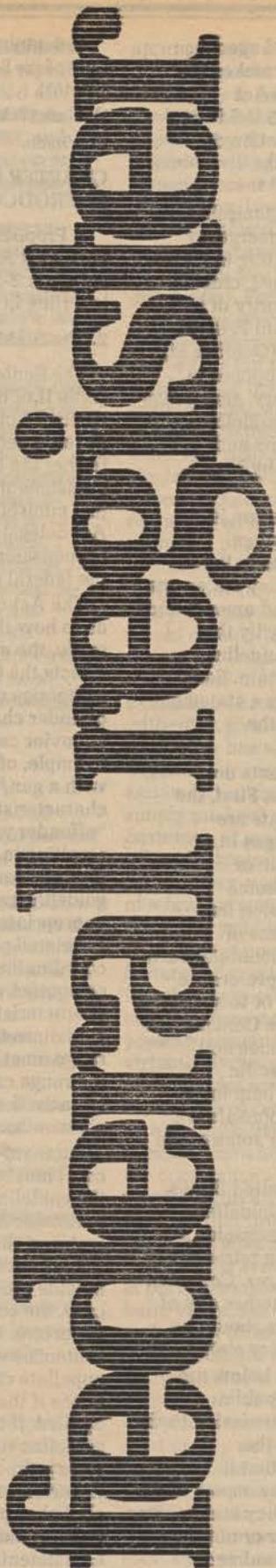
#### International Trade Administration

#### University of California, Berkeley; Decision on Application for Duty-Free Entry of Scientific Instrument

#### *Correction*

In notice document 90-2386 beginning on page 3439 in the issue of Thursday, February 1, 1990, make the following correction:

On page 3439, in the second column, in the fourth complete paragraph, in the



**Friday**  
**February 16, 1990**

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## **Part II**

# **United States Sentencing Commission**

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**Sentencing Guidelines for United States  
Courts; Notice**

## UNITED STATES SENTENCING COMMISSION

### Sentencing Guidelines for United States Courts

**AGENCY:** United States Sentencing Commission.

**ACTION:** Notice of proposed amendments and additions to sentencing guidelines, policy statements and commentary. Request for public comment. Notice of hearing.

**SUMMARY:** The Commission is considering (1) making permanent certain amendments that were promulgated in October 1989 as temporary, emergency amendments and (2) promulgating additional permanent amendments and additions to the sentencing guidelines, policy statements, and commentary. The proposed new amendments, or a synopsis of issues to be addressed, are set forth below. The Commission may report regular amendments to the Congress on or before May 1, 1990. Comment is sought on all proposals, alternative proposals, and any other aspect of the sentencing guidelines, policy statements, and commentary.

**DATES:** Public comment should be received by the Commission no later than March 30, 1990, in order for it to be considered by the Commission in the promulgation of regular amendments due to the Congress by May 1, 1990. The Commission has scheduled a public hearing for March 15, 1990, in the Ceremonial Courtroom of the United States Courthouse in Washington, DC on these amendments.

**ADDRESSES:** Comments should be sent to: United States Sentencing Commission, 1331 Pennsylvania Avenue, NW., Suite 1400, Washington, DC 20004, Attn: Communications Director.

**FOR FURTHER INFORMATION CONTACT:** Paul K. Martin, Communications Director, Telephone: (202) 662-8800.

**SUPPLEMENTARY INFORMATION:** The United States Sentencing Commission is an independent agency in the judicial branch of the U.S. Government. The Commission is empowered by 28 U.S.C. 994(a) to promulgate sentencing guidelines and policy statements for Federal sentencing courts. The statute further directs the Commission to periodically review and revise guidelines previously promulgated and authorizes it to submit guideline amendments to the Congress no later than the first day of May each year. See 28 U.S.C. 994(o), (p).

Ordinarily, the Administrative Procedure Act rulemaking requirements

are inapplicable to judicial agencies; however, 28 U.S.C. 994(x) makes the Administrative Procedure Act rulemaking provisions of 5 U.S.C. 553 applicable to the promulgation of sentencing guidelines by the Commission.

In October 1989, the Commission promulgated temporary, emergency sentencing guidelines relating to (1) the possession of cocaine base ("crack"); and (2) the statutory authority of judges to deny or terminate certain Federal benefits. See 54 FR 46032 (October 31, 1989). The Commission proposes to promulgate these temporary, emergency guidelines as permanent guidelines and to report these amendments and revisions to the Congress by May 1, 1990.

In addition, the Commission is considering a number of other amendments and additions to the sentencing guidelines, policy statement and commentary. Proposed amendments are presented sequentially by the chapter and part of the Guidelines Manual to which they pertain. Each amendment is followed by a statement explaining the reason for the amendment.

The proposed amendments are presented in three formats. First, the majority of the amendments are proposed as specific changes in a guideline, policy statement, or commentary. Second, for some amendments the Commission has published alternative means of addressing an issue. Commentators are encouraged to state their preference among listed alternatives or to suggest a new alternative. Third, the Commission has highlighted certain issues and invites suggestions for specific amendment language. To help focus comment, one or more proposals are presented as examples for some of the issues.

Section 1B1.10 of the United States Sentencing Commission Guidelines Manual sets forth the Commission's policy statement regarding retroactivity of amended guideline ranges. Comment is requested regarding whether any of the proposed amendments should be retroactive under this policy statement.

While the amendments below are specifically proposed for public comment and possible submission to the Congress by May 1, 1990, the Commission emphasizes that it welcomes comment on any aspect of the sentencing guidelines, policy statements, and commentary, whether or not the subject of a proposed amendment.

**Authority.** 28 U.S.C. 994(a), (o), (p), (x); sec. 21(a) of the Sentencing Act of 1987 [Pub. L. 100-182].

William W. Wilkins, Jr.,  
Chairman.

### CHAPTER ONE, PART A (INTRODUCTION)

**1. Proposed Amendment:** Chapter One, Part A, is amended by deleting subparts 2-5 in their entirety and inserting in lieu thereof:

#### 2. The Statutory Mission

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the basic purposes of criminal punishment: Deterrence, incapacitation, just punishment and rehabilitation. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process.

The Act contains detailed instructions as to how this determination should be made, the most important of which directs the Commission to create categories of offense behavior and offender characteristics. An offense behavior category might consist, for example, of "bank robbery/committed with a gun/\$2500 taken." An offender characteristic category might be "offender with one prior conviction not resulting in imprisonment." The Commission is required to prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons determined by coordinating the offense behavior categories with the offender characteristic categories. Where the guidelines call for imprisonment, the range must be narrow: the maximum of the range cannot exceed the minimum by more than the greater of 25 percent or six months. 28 U.S.C. 994(b)(2).

Pursuant to the Act, the sentencing court must select a sentence from within the guideline range. If, however, a particular case presents atypical features, the Act allows the court to depart from the guidelines and sentence outside the prescribed range. In that case, the court must specify reasons for departure. 18 U.S.C. 3553(b). If the court sentences within the guideline range, an appellate court may review the sentence to see if the guidelines were correctly applied. If the court departs from the guideline range, an appellate court may review the reasonableness of the departure. 18 U.S.C. 3742. The Act also abolishes parole, and substantially reduces and restructures good behavior adjustments.

The Commission's initial guidelines were submitted to Congress on April 13, 1987. After the prescribed period of Congressional review, the guidelines took effect on November 1, 1987, and apply to all offenses committed on or after that date. The Commission has the authority to submit guideline amendments each year to Congress between the beginning of a regular Congressional session and May 1. Such amendments automatically take effect 180 days after submission unless a law is enacted to the contrary. 28 U.S.C. 994(p).

The initial sentencing guidelines and policy statements were developed after extensive hearings, deliberation, and consideration of substantial public comment. The Commission emphasizes, however, that it views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines through submission of amendments to Congress. To this end, the Commission is established as a permanent agency to monitor sentencing practices in the federal courts.

### 3. The Basic Approach (Policy Statement)

To understand the guidelines and their underlying rationale, it is important to focus on the three objectives that Congress sought to achieve in enacting the Sentencing Reform Act of 1984. The Act's basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system. To achieve this end, Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system which required the court to impose an indeterminate sentence that was automatically reduced in most cases by "good time" credits. In addition, the parole commission was permitted to determine how much of the remainder of any prison sentence an offender actually would serve. This practice usually resulted in a substantial reduction in the effective length of the sentence imposed, with defendants often serving only about one-third of the sentence adjudged by the court.

Second, Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes

appropriately different sentences for criminal conduct of differing severity.

Honesty is easy to achieve: the abolition of parole makes the sentence imposed by the court the sentence the offender will serve, less approximately fifteen percent for good behavior. There is a tension, however, between the mandate of uniformity (treat similar cases alike) and the mandate of proportionality (treat different cases differently). Perfect uniformity—sentencing every offender to five years—destroys proportionality. Having only a few simple categories of crimes would make the guidelines uniform and easy to administer, but might lump together offenses that are different in important respects. For example, a single category for robbery that included armed and unarmed robberies, robberies with and without injuries, robberies of a few dollars and robberies of millions, would be far too broad.

A sentencing system tailored to fit every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the certainty of punishment and its deterrent effect. For example: A bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, teller, or customer, at night (or at noon), in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time.

The list of potentially relevant features of criminal behavior is long; the fact that they can occur in multiple combinations means that the list of possible permutations of factors is virtually endless. The appropriate relationships among these different factors are exceedingly difficult to establish, for they are often context specific. Sentencing courts do not treat the occurrence of a simple bruise identically in all cases, irrespective of whether that bruise occurred in the context of a bank robbery or in the context of a breach of peace. This is so, in part, because the risk that such a harm will occur differs depending on the underlying offense with which it is connected (and therefore may already be counted, to a different degree, in the punishment for the underlying offense); and also because, in part, the relationship between punishment and multiple harms is not simply additive. The relation varies depending on how much other harm has occurred. Thus, it would not be proper to assign points for each kind of harm and simply add them

up, irrespective of context and total amounts.

The larger the number of subcategories, the greater the complexity and the less workable the system. Moreover, the subcategories themselves, sometimes too broad and sometimes too narrow, will apply and interact in unforeseen ways to unforeseen situations, thus failing to cure the unfairness of a simple, broad category system. Finally, and perhaps most importantly, probation officers and courts, in applying a complex system of subcategories, would have to make a host of decisions about whether the underlying facts are sufficient to bring the case within a particular subcategory. The greater the number of decisions required and the greater their complexity, the greater the risk that different judges will apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to eliminate.

In view of the arguments, it would have been tempting to retreat to the simple, broad-category approach and to grant courts the discretion to select the proper point along a broad sentencing range. Granting such broad discretion, however, would have risked correspondingly broad disparity in sentencing, for different courts may exercise their discretionary powers in different ways. Such an approach would have risked a return to the wide disparity that Congress established the Commission to limit.

In the end, there is no completely satisfying solution to this practical stalemate. The Commission had to balance the comparative virtues and vices of broad, simple categorization and detailed, complex subcategorization, and within the constraints established by that balance, minimize the discretionary powers of the sentencing court. Any system will, to a degree, enjoy the benefits and suffer from the drawbacks of each approach.

A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Most observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down. Some argue that appropriate punishment should be defined primarily on the basis of the moral principle of "just deserts." Under this principle, punishment should be scaled to the offender's culpability and the resulting harms. Thus, if a defendant is less culpable, the

defendant deserves less punishment. Others argue that punishment should be imposed primarily on the basis of practical "crime control" considerations. This theory calls for sentences that most effectively lessen the likelihood of future crime, either by deterring others or incapacitating the defendant.

Adherents of these points of view urged the Commission to choose between them and accord one primacy over the other. Such a choice would have been profoundly difficult. The relevant literature is vast, the arguments deep, and each point of view has much to be said in its favor. As a practical matter, in most sentencing decisions the application of either philosophy may prove consistent with the same result.

In its initial set of guidelines, the Commission sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that used as a starting point data estimating pre-guidelines sentencing practice. It analyzed data drawn from 10,000 presentence investigations, the differing elements of various crimes as distinguished in substantive criminal statutes, the United States Parole Commission's guidelines and statistics, and data from other relevant sources in order to determine which distinctions were important in pre-guidelines practice. After consideration, the Commission accepted, modified, or rationalized the more important of these distinctions.

This empirical approach helped the Commission resolve its practical problem by defining a list of relevant distinctions that, although of considerable length, was short enough to create a manageable set of guidelines. Existing categories are relatively broad and omit distinctions that some may believe important, yet they include most of the major distinctions that statutes and data suggest made a significant difference in sentencing decisions. Relevant distinctions not reflected in the guidelines probably will occur rarely and sentencing courts may take such unusual cases into account by departing from the guidelines.

The Commission's empirical approach also helped resolve its philosophical dilemma. Those who adhere to a just deserts philosophy may concede that the lack of moral consensus might make it difficult to say exactly what punishment is deserved for a particular crime. Likewise, those who subscribe to a philosophy of crime control may acknowledge that the lack of sufficient data might make it difficult to determine exactly the punishment that will best prevent that crime. Both groups might

therefore recognize the wisdom of looking to those distinctions that judges and legislators have in fact made over the course of time. These established distinctions are ones that the community believes, or has found over time, to be important from either a moral or crime-control perspective.

The Commission did not simply copy estimates of pre-guidelines practice as revealed by the data, even though establishing offense values on this basis would help eliminate disparity because the data represent averages. Rather, it departed from the data at different points for various important reasons. Congressional statutes, for example, suggested or required departure, as in the case of the Anti-Drug Abuse Act of 1986 that imposed increased and mandatory minimum sentences. In addition, the data revealed inconsistencies in treatment, such as punishing economic crime less severely than other apparently equivalent behavior.

Despite these policy-oriented departures from pre-guidelines practice, the guidelines represent an approach that begins with, and builds upon, empirical data. The guidelines will not please those who wish the Commission to adopt a single philosophical theory and then work deductively to establish a simple and perfect set of categorizations and distinctions. The guidelines may prove acceptable, however, to those who seek more modest, incremental improvements in the status quo, who believe the best is often the enemy of the good, and who recognize that these guidelines are, as the Act contemplates, but the first step in an evolutionary process. After spending considerable time and resources exploring alternative approaches, the Commission developed these guidelines as a practical effort toward the achievement of a more honest, uniform, equitable, proportional, and therefore effective sentencing system.

#### 4. The Guidelines' Resolution of Major Issues (Policy Statement)

The guideline-drafting process required the Commission to resolve a host of important policy questions typically involving rather evenly balanced sets of competing considerations. As an aid to understanding the guidelines, this introduction briefly discusses several of those issues; commentary in the guidelines explains others.

(a) *Real Offense vs. Charge Offense Sentencing.* One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant

engaged regardless of the charges for which he was indicted or convicted ("real offense" sentencing), or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted ("charge offense" sentencing). A bank robber, for example, might have used a gun, frightened bystanders, taken \$50,000, injured a teller, refused to stop when ordered, and raced away damaging property during his escape. A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.

The Commission initially sought to develop a real offense system. After all, the pre-guidelines sentencing system was, in a sense, a real offense system. The sentencing court and the parole commission took account of the conduct in which the defendant actually engaged, as determined in a presentence report, at the sentencing hearing, or before a parole commission hearing officer. The Commission's initial efforts in this direction, carried out in the spring and early summer of 1986, proved unproductive, mostly for practical reasons. To make such a system work, even to formalize and rationalize the status quo, would have required the Commission to decide precisely which harms to take into account, how to add them up, and what kinds of procedures the courts should use to determine the presence or absence of disputed factual elements. The Commission found no practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did it find a practical way to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process given the potential existence of hosts of adjudicated "real harm" facts in many typical cases. The effort proposed as a solution to these problems required the use of, for example, quadratic roots and other mathematical operations that the Commission considered too complex to be workable. In the Commission's view, such a system risked return to wide disparity in sentencing practice.

In its initial set of guidelines transmitted to Congress in April 1987, the Commission moved closer to a "charge offense" system. The system is not, however, pure because it contains a number of real offense elements. For one thing, the hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law forced

the Commission to write guidelines that are descriptive of generic conduct rather than guidelines that track purely statutory language. For another, the guidelines take account of a number of important, commonly occurring real offense elements such as role in the offense, the presence of a gun, or the amount of money actually taken through alternative base offense levels, specific offense characteristics, cross-references, and adjustments.

The Commission recognized that a charge offense system has drawbacks of its own. One of the most important is the potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment. Of course, the defendant's actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor's ability to increase a defendant's sentence. Moreover, the Commission has written its rules for the treatment of multicount convictions with an eye toward eliminating unfair treatment that might flow from count manipulation. For example, the guidelines treat a three-count indictment, each count of which charges sale of 100 grams of heroin or theft of \$10,000, the same as a single-count indictment charging sale of 300 grams of heroin or theft of \$30,000. Furthermore, a sentencing court may control any inappropriate manipulation of the indictment through use of its departure power. Finally, the Commission will closely monitor charging and plea negotiation practices and will make appropriate adjustments should they become necessary.

(b) *Departures.* The sentencing statute permits a court to depart from a guideline-specified sentence only when it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. 3553(b). The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, Socio-Economic Status), the third sentence of § 5H1.4 (Physical Condition, Including Drug Dependence and Alcohol Abuse), and the last sentence of § 5K2.12 (Coercion

and Duress), list several factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.

The Commission has adopted this departure policy for two reasons. First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that the initial set of guidelines need not do so. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.

Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in pre-guidelines sentencing practice. Thus, for example, where the presence of physical injury made an important difference in pre-guidelines sentencing practice (as in the case of robbery, assault, or arson), the guidelines specifically include this factor to enhance the sentence. Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data did not permit the Commission to conclude that the factor was empirically important in relation to the particular offense. Of course, an important factor (e.g., physical injury) may infrequently occur in connection with a particular crime (e.g., fraud). Such rare occurrences are precisely the type of events that the court's departure powers were designed to cover—unusual cases outside the range of the more typical offenses for which the guidelines were designed.

It is important to note that the guidelines refer to two different kinds of departure. The first involves instances in which the guidelines provide specific guidance for departure by analogy or by other numerical or non-numerical suggestions. For example, the Commentary to § 2G1.1 (Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct),

recommends a downward departure of eight levels where commercial purpose was not involved. The Commission intends such suggestions as policy guidance for the courts. The Commission expects that most departures will reflect the suggestions and that the courts of appeals may prove more likely to find departures "unreasonable" where they fall outside suggested levels.

A second type of departure will remain unguided. It may rest upon grounds referred to in Chapter 5, Part K (Departures), or on grounds not mentioned in the guidelines. While Chapter 5, Part K lists factors that the Commission believes may constitute grounds for departure, those suggested grounds are not exhaustive. The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly infrequent.

(c) *Plea Agreements.* Nearly ninety percent of all federal criminal cases involve guilty pleas and many of these cases involve some form of plea agreement. Some commentators on early Commission guideline drafts urged the Commission not to attempt any major reforms of the agreement process on the grounds that any set of guidelines that threatens to radically change present practice also threatens to make the federal system unmanageable. Others, starting with the same facts, argued that guidelines which fail to control and limit plea agreements would leave untouched a "loophole" large enough to undo the good that sentencing guidelines may bring. Still other commentators made both arguments.

The Commission decided not to make major changes in plea agreement practices in the initial guidelines, but rather to provide guidance by issuing general policy statements concerning the acceptance of plea agreements in Chapter Six, Part B (Plea Agreements). The rules set forth in Fed.R.Crim.P. 11(e) govern the acceptance or rejection of such agreements. The Commission will collect data on the courts' plea practices and will analyze this information to determine when and why the courts accept or reject plea agreements and whether plea bargaining practices are undermining the intent of the Sentencing Reform Act. In light of this information and analysis, the Commission will seek to further regulate the plea agreement process as appropriate.

The Commission expects the guidelines to have a positive, rationalizing impact upon plea

agreements for two reasons. First, the guidelines create a clear, definite expectation in respect to the sentence that a court will impose if a trial takes place. Insofar as a prosecutor and defense attorney seek to agree about a likely sentence or range of sentences, they will no longer work in the dark. This fact alone should help to reduce irrationality in respect to actual sentencing outcomes. Second, the guidelines create a norm to which courts will likely refer when they decide whether, under Rule 11(e), to accept or to reject a plea agreement or recommendation.

(d) *Probation and Split Sentences.* The statute provides that the guidelines are to "reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . . .<sup>28</sup> U.S.C. 994(j). Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission's view are "serious."

The Commission's solution to this problem has been to write guidelines that classify many offenses for which probation previously was frequently given as serious and provide for at least a short period of imprisonment in such cases. The Commission concluded that the definite prospect of prison, even though the term may be short, will serve as a significant deterrent, particularly when compared with pre-guidelines practice where probation, not prison, was the norm.

More specifically, the guidelines work as follows in respect to a first offender. For offense levels one through six, the sentencing court may elect to sentence the offender to probation (with or without confinement conditions) or to a prison term. For offense levels seven through ten, the court may substitute probation for a prison term, but the probation must include confinement conditions (community confinement, intermittent confinement, or home detention). For offense levels eleven and twelve, the court must impose at least one half the minimum confinement sentence in the form of prison confinement, the remainder to be served on supervised release with a condition of community confinement or home detention. The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify

probation at higher offense levels through departures.

(e) *Multi-Count Convictions.* The Commission, like several state sentencing commissions, has found it particularly difficult to develop rules for sentencing defendants convicted of multiple violations of law, each of which makes up a separate count in an indictment. The difficulty is that when a defendant engages in conduct that causes several harms, each additional harm, even if it increases the extent to which punishment is warranted, does not necessarily warrant a proportionate increase in punishment. A defendant who assaults others during a fight, for example, may warrant more punishment if he injures ten people than if he injures one, but his conduct does not necessarily warrant ten times the punishment. If it did, many of the simplest offenses, for reasons that are often fortuitous, would lead to life sentences of imprisonment—sentences that neither "just deserts" nor "crime control" theories of punishment would justify.

Several individual guidelines provide special instructions for increasing punishment when the conduct that is the subject of that count involves multiple occurrences or has caused several harms. The guidelines also provide general rules for aggravating punishment in light of multiple harms charged separately in separate counts. These rules may produce occasional anomalies, but normally they will permit an appropriate degree of aggravation of punishment for multiple offenses that are the subjects of separate counts.

These rules are set out in Chapter Three, Part D (Multiple Counts). They essentially provide: (1) When the conduct involves fungible items (e.g., separate drug transactions or thefts of money), the amounts are added and the guidelines apply to the total amount; (2) When nonfungible harms are involved, the offense level for the most serious count is increased (according to a diminishing scale) to reflect the existence of other counts of conviction. The guidelines have been written in order to minimize the possibility that an arbitrary casting of a single transaction into several counts will produce a longer sentence. In addition, the sentencing court will have adequate power to prevent such a result through departures.

(f) *Regulatory Offenses.* Regulatory statutes, though primarily civil in nature, sometimes contain criminal provisions in respect to particularly harmful activity. Such criminal provisions often describe not only substantive offenses,

but also more technical, administratively-related offenses such as failure to keep accurate records or to provide requested information. These criminal statutes pose two problems: first, which criminal regulatory provisions should the Commission initially consider, and second, how should it treat technical or administratively-related criminal violations?

In respect to the first problem, the Commission found that it cannot comprehensively treat all regulatory violations in the initial set of guidelines. There are hundreds of such provisions scattered throughout the United States Code. To find all potential violations would involve examination of each individual federal regulation. Because of this practical difficulty, the Commission has sought to determine, with the assistance of the Department of Justice and several regulatory agencies, which criminal regulatory offenses are particularly important in light of the need for enforcement of the general regulatory scheme. The Commission addressed these offenses in the initial guidelines. It will address the less common regulatory offenses in the future.

In respect to the second problem, the Commission has developed a system for treating technical recordkeeping and reporting offenses that divides them into four categories. First, in the simplest of cases, the offender may have failed to fill out a form intentionally, but without knowledge or intent that substantive harm would likely follow. He might fail, for example, to keep an accurate record of toxic substance transport, but that failure may not lead, nor be likely to lead, to the release or improper handling of any toxic substance. Second, the same failure may be accompanied by a significant likelihood that substantive harm will occur; it may make a release of a toxic substance more likely. Third, the same failure may have led to substantive harm. Fourth, the failure may represent an effort to conceal a substantive harm that has occurred.

The structure of a typical guideline for a regulatory offense provides a low base offense level (e.g., 6) aimed at the first type of recordkeeping or reporting offense. Specific offense characteristics designed to reflect substantive harms that do occur in respect to some regulatory offenses, or that are likely to occur, increase the offense level. A specific offense characteristic also provides that a recordkeeping or reporting offense that conceals a substantive offense will be treated like the substantive offense.

(g) *Sentencing Ranges.* In determining the appropriate sentencing ranges for each offense, the Commission estimated the average sentences served within each category under the pre-guidelines sentencing system. It also examined the sentence specified in congressional statutes, in the parole guidelines, and in other relevant, analogous sources. The Commission's Supplementary Report on the Initial Sentencing Guidelines (1987) contains a comparison between estimates of pre-guidelines sentencing practices and sentences under the guidelines.

While the Commission has not considered itself bound by pre-guidelines sentencing practice, it has not tried to develop an entirely new system of sentencing on the basis of theory alone. Guideline sentences, in many instances, will approximate average pre-guidelines practice and adherence to the guidelines will help to eliminate wide disparity. For example, where a high percentage of persons received probation under pre-guidelines practice, a guideline may include one or more specific offense characteristics in an effort to distinguish those types of defendants who received probation from those who received more severe sentences. In some instances, short sentences of incarceration for all offenders in a category have been substituted for a pre-guidelines sentencing practice of very wide variability in which some defendants received probation while others received several years in prison for the same offense. Moreover, inasmuch as those who pleaded guilty under pre-guidelines practice often received lesser sentences, the guidelines also permit the court to impose lesser sentences on those defendants who accept responsibility for their misconduct and those who provide substantial assistance to the government in the investigation or prosecution of others.

The Commission has also examined its sentencing ranges in light of their likely impact upon prison population. Specific legislation, such as the Anti-Drug Abuse Act of 1986 and the career offender provisions of the Sentencing Reform Act of 1984 (28 U.S.C. 994(h)), requires the Commission to promulgate guidelines that will lead to substantial prison population increases. These increases will occur irrespective of the guidelines. The guidelines themselves, insofar as they reflect policy decisions made by the Commission (rather than legislated mandatory minimum or career offender sentences), are projected to lead to an increase in prison population that computer models, produced by the

Commission and the Bureau of Prisons in 1987, estimate at approximately 10 percent over a period of ten years.

(h) *The Sentencing Table.* The Commission has established a sentencing table that for technical and practical reasons contains 43 levels. Each row in the table prescribes ranges that overlap with the ranges in the preceding and succeeding rows. By overlapping the ranges, the table should discourage unnecessary litigation. Both prosecutor and defendant will realize that the difference between one level and another will not necessarily make a difference in the sentence that the judge imposes. Thus, little purpose will be served in protracted litigation trying to determine, for example, whether \$10,000 or \$11,000 was obtained as a result of a fraud. At the same time, the rows work to increase a sentence proportionately. A change of 6 levels roughly doubles the sentence irrespective of the level at which one starts. The guidelines, in keeping with the statutory requirement that the maximum of any range cannot exceed the minimum by more than the greater of 25 percent or six months, permit courts to exercise the greatest permissible range of sentencing discretion. The table overlaps offense levels meaningfully, works proportionately, and at the same time preserves the maximum degree of allowable discretion for the judge within each level.

Similarly, many of the individual guidelines refer to tables that correlate amounts of money with offense levels. These tables often have many rather than a few levels. Again, the reason is to minimize the likelihood of unnecessary litigation. If a money table were to make only a few distinctions, each distinction would become more important and litigation over which category an offender fell within would become more likely. Where a table has many smaller monetary distinctions, it minimizes the likelihood of litigation because the precise amount of money involved is of considerably lesser importance.

##### 5. A Concluding Note

The Commission emphasizes that it drafted the initial guidelines with considerable caution. It examined the many hundreds of criminal statutes in the United States Code. It began with those that are the basis for a significant number of prosecutions. It has sought to place them in a rational order. It developed additional distinctions relevant to the application of these provisions and it applied sentencing ranges to each resulting category. In doing so, it relied upon pre-guidelines sentencing practices as revealed by its

own statistical analyses based on summary reports of some 40,000 convictions, a sample of 10,000 augmented presentence reports, the parole guidelines, and policy judgments.

The Commission recognizes that some will criticize this approach as overly cautious, as representing too little a departure from existing practice. Yet, it will cure wide disparity. The Commission is a permanent body that can amend the guidelines each year. Although the data available to it, like all data, are imperfect, experience with the guidelines will lead to additional information and provide a firm empirical basis for consideration of revisions.

Finally, the guidelines will apply to more than 90 percent of all felony and Class A misdemeanor cases in the federal courts. Because of time constraints and the nonexistence of statistical information, some offenses that occur infrequently are not considered in the guidelines. Their exclusion does not reflect any judgment about their seriousness and they will be addressed as the Commission refines the guidelines over time."

**Reason for Amendment:** This amendment updates this part to reflect the implementation of guideline sentencing on November 1, 1987, and makes various clarifying and editorial changes to enhance the usefulness of this part both as a historical overview and as an introduction to the structure and operation of the guidelines.

#### CHAPTER ONE, PART B (GENERAL APPLICATION PRINCIPLES)

**2. Proposed Amendment:** Section 1B1.8(a) is amended by inserting "as part of that cooperation agreement" immediately following "unlawful activities of others, and", and by deleting "so" immediately before "provided", and by inserting "pursuant to the agreement" immediately following "provided".

Section 1B1.8(b) is amended by renumbering subdivisions (2) and (3) as (3) and (4) respectively, and by inserting the following as subdivision (2):

"(2) in determining the defendant's criminal history under Chapter Four, Part A (Criminal History) or § 4B1.1 (Career Offender);".

The Commentary to § 1B1.8 captioned "Application Notes" is amended in Note 2 by deleting "The Commission does not intend this guideline to interfere with determining" and inserting in lieu thereof "Subsection (b)(2) provides that this guideline shall not be applied to restrict the use of information in determining".

Section 1B1.8(b)(3) is amended by inserting "by the defendant" immediately before the period at the end of the sentence.

**Reason for Amendment:** This amendment expressly provides that the use of information concerning the defendant's criminal history cannot be restricted under this guideline section. Application Note 2 in the Commentary of the current guideline states that the Commission does not intend this to happen, but inclusion in the guideline itself is desirable to expressly require this result and eliminate any room for argument or misinterpretation. In addition, this amendment makes several clarifying changes.

#### CHAPTER ONE, PART B (GENERAL APPLICATION PRINCIPLES), CHAPTER THREE, PART D (MULTIPLE COUNTS)

**3. Proposed Amendment:** The Commentary to § 1B1.3 captioned "Application Notes" is amended in Note 2 by deleting the last sentence and inserting in lieu thereof:

"Offenses of a character for which § 3D1.2(d) would require grouping of multiple counts," as used in subsection (a)(2), applies to offenses for which grouping of counts would be required under § 3D1.2(d) had the defendant been convicted on multiple counts. Application of this provision does not require that the defendant, in fact, have been convicted on multiple counts. For example, where the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine, as part of the same course of conduct or common scheme or plan, subsection (a)(2) provides that the total quantity of cocaine sold (45 grams) is to be used to determine the offense level even if the defendant is convicted on a single count charging only one of the sales. If the defendant is convicted on multiple counts for the above noted sales, the grouping rules of Chapter Three, Part D (Multiple Counts) will provide that the counts are grouped together. Chapter Three, Part D (Multiple Counts), which applies to convictions on multiple counts, does not limit the scope of § 1B1.3(a)(2) because, as discussed above, application of subsection (a)(2) does not require that the defendant actually have been convicted on multiple counts."

The Commentary to § 3D1.2 captioned "Application Notes" is amended in Note 4 by inserting the following additional example by renumbering example (4) as (5) and inserting the following as example (4):

(4) The defendant is convicted on two counts of distributing a controlled substance, each count involving a separate sale of 10 grams of cocaine that is part of a common scheme or plan. In addition, a finding is made that there are two other sales, also part of the common scheme or plan, each involving 10 grams of cocaine. The total amount of all four

sales (40 grams of cocaine) will be used to determine the offense level for each count under § 1B1.3(a)(2). The two counts will then be grouped together under this subsection to avoid double counting."

**Reason for Amendment:** This amendment clarifies the intended scope of § 1B1.3(a)(2) in conjunction with the multiple count guidelines to ensure that the latter are not read to limit the former only to conduct of which the defendant was convicted, as apparently occurred in *United States v. Restrepo*, 883 F.2d 781 (9th Cir. 1989). Petition for rehearing by the Government, as recommended by the Commission, is pending in that case. While the Commission believes that the current language of the respective guidelines and commentary is clear on the issues that apparently caused confusion for the Restrepo panel, further comment is invited on the above proposal in order to elicit suggestions for improving the clarity of the existing language.

#### CHAPTER TWO, PART A (OFFENSES AGAINST THE PERSON)

**4. Proposed Amendment:** Section 2A2.1 is amended in the title by deleting "Conspiracy or Solicitation to Commit Murder;" and by deleting subsections (a) and (b) in their entirety, and inserting the following in lieu thereof:

##### (a) Base Offense Level:

(1) 28, if the object of the offense would have constituted first degree murder; or

(2) 22, otherwise.

##### (b) Specific Offense Characteristics

(1)(A) If the victim sustained permanent or life-threatening bodily injury, increase by 4 levels; (B) if the victim sustained serious bodily injury, increase by 2 levels; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels.

(2) If the offense involved the offer or the receipt of anything of pecuniary value for undertaking the murder, increase by 4 levels."

The Commentary to § 2A2.1 captioned "Statutory Provisions" is amended by deleting "(d), 373,"; by deleting "1117,"; and by deleting "(d)," immediately following "1751(c)".

The Commentary to § 2A2.1 captioned "Application Notes" is amended in Note 1 by deleting: "more than minimal planning," "firearm," "dangerous weapon," "brandished," "otherwise used,"", by inserting the following additional note:

"2. "First degree murder," as used in subsection (a)(1) means conduct that, if committed within the special maritime and territorial jurisdiction of the United States, would constitute first degree murder under 18 U.S.C. 1111."

and in the caption by deleting "Note" and inserting in lieu thereof "Notes".

The Commentary to § 2A2.1 captioned "Background" is amended by deleting the second and third paragraphs, and by inserting the following sentence at the end of the first paragraph:

"An attempted manslaughter, or assault with intent to commit manslaughter, is covered under § 2A2.2 (Aggravated Assault)."

The Commentary to § 2A2.2 captioned "Application Notes" is amended in Note 3 by inserting as the first sentence: "This guideline also covers attempted manslaughter and assault with intent to commit manslaughter."

The Commentary to § 2A2.2 captioned "Background" is amended in the first sentence by deleting "where there is no intent to kill".

Chapter Two, Part A, Subpart 1, is amended by inserting the following additional guideline:

#### "2A1.5. Conspiracy or Solicitation to Commit Murder

##### (a) Base Offense Level: 28

##### (b) Specific Offense Characteristics

(1) If the offense involved the offer or the receipt of anything of pecuniary value for undertaking the murder, increase by 4 levels.

##### (c) Cross Reference

(1) If the conduct resulted in the death of a victim, apply § 2A1.1 (First Degree Murder).

(2) If the conduct constituted attempted murder or assault with intent to commit murder, apply § 2A2.1 (Assault With Intent to Commit Murder; Attempted Murder).

#### Commentary

*Statutory Provisions:* 18 U.S.C. §§ 351(d), 373, 1117, 1751(d)."

The title to § 2A2.1 is amended by deleting "Conspiracy or Solicitation to Commit Murder;".

The Commentary to § 2A2.1 captioned "Statutory Provisions" is amended by deleting "(d), 373"; by deleting "1117"; and by deleting "(d)," immediately following "1751(c)".

**Conforming Amendment:** Section 2E1.4(a)(1) is amended by deleting "23" and inserting in lieu thereof "32".

The Commentary to § 2E1.4(a)(1) captioned "Application Notes" is amended by deleting Note 2, and in the caption by deleting "Notes" and inserting in lieu thereof "Note".

**Reason for Amendment:** This amendment restructures this guideline, and increases the offense level for attempted murder and assault with intent to commit murder where the intended offense, if successful, would

have constituted first degree murder to better reflect the seriousness of this conduct. For the same reason, the enhancement for an offense involving the offer or receipt of anything of pecuniary value for undertaking the murder is increased. For greater clarity, an additional guideline is proposed (§ 2A1.5) to cover conspiracy or solicitation to commit murder. Cross references are provided in the proposed § 2A1.5 where the offense actually resulted in the death of a victim or constituted attempted murder or assault with intent to murder. Finally, § 2E1.4 is amended to conform to the offense level in the proposed § 2A1.5.

## CHAPTER TWO, PART B (OFFENSES INVOLVING PROPERTY)

**5. Proposed Amendment:** Section 2B1.1 is amended by renumbering subsection (b)(5) as (b)(4), and by renumbering the current subsection (b)(4) as (b)(5).

Section 2B1.2 is amended by renumbering subsection (b)(4) as (b)(3), and by renumbering the current subsection (b)(3) as (b)(4).

Section 2B1.3 is amended by renumbering subsection (b)(3) as (b)(2), and by renumbering the current subsection (b)(2) as (b)(3).

**Reason for Amendment:** In cases involving the theft or destruction of U.S. mail, the theft guideline (§ 2B1.1), stolen property guideline (§ 2B1.2), property destruction guideline (§ 2B1.1), and forgery guideline (§ 2B5.2) produce identical results if the amount involved more than \$1,000, or if the offense did not involve more than minimal planning. However, because of the ordering of the specific offense characteristics, there is a 1 or 2-level difference between §§ 2B1.1, 2B1.2 and § 2B1.3 on one hand, and § 2B5.2 on the other in cases of stolen or destroyed mail where there is more than minimal planning and a loss of \$1,000 or less. In these cases, §§ 2B1.1, 2B1.2 and 2B1.3 produce a result that is 1 or 2-levels lower than § 2B5.2. This result appears anomalous. This amendment conforms the offense level in §§ 2B1.1, 2B1.2, and 2B1.3, to that of § 2B5.2 in such cases.

**6. Proposed Amendment:** The Commentary to § 2B1.1 captioned "Application Notes" is amended in Note 2 by beginning a new paragraph with the fifth sentence.

The Commentary to § 2B1.1 captioned "Application Notes" is amended in Note 2 in the fifth sentence by deleting "loss" and inserting in lieu thereof "offense level", and by inserting immediately before the period at the end of the

sentence "; see Application Note 4 of the Commentary to § 2X1.1".

The Commentary to § 2B1.1 captioned "Application Notes" is amended in Note 2 by deleting the sixth and seventh sentences, and by inserting the following at the end of the first paragraph:

"Examples: (1) In the case of a theft of a check or money order, the loss is the loss that would have occurred if the check or money order had been cashed. (2) In the case of a defendant apprehended in the process of taking a vehicle, the loss is the value of the vehicle even if the vehicle is recovered immediately."

The Commentary to § 2B1.1 captioned "Application Notes" is amended by deleting Note 3 in its entirety and inserting in lieu thereof:

"3. Where the exact loss is not readily ascertainable, the court, for the purposes of subsection (b)(1), need only make a reasonable estimate of the range of loss, given the available information. This estimate may, for example, be based upon the approximate number of victims and the average loss to each victim, or on factors such as the scope and duration of the offense."

**Reason for Amendment:** This amendment revises Application Note 2 of the Commentary to § 2B1.1 to provide a more precise reference to the pertinent portion of § 2X1.1 that applies in cases of partially completed conduct. In addition, the amendment reorders the material in this note, and divides it into separate paragraphs for greater clarity. This amendment also clarifies Application Note 3 of the Commentary to § 2B1.1.

**7. Proposed Amendment:** Section 2B1.3 is amended in the title by deleting "(Other than by Arson or Explosives)" and by inserting the following:

### (c) Cross Reference

(1) If the conduct involved arson, or property damage by use of explosives, apply § 2K1.4 (Arson; Property Damage by Use of Explosives) if the resulting offense level is greater than determined above.".

The Commentary to § 2B1.3 captioned "Statutory Provisions" is amended by deleting the last sentence.

**Conforming Amendment:** Section 2H3.3(a)(3) is amended by deleting "[Other than by Arson or Explosives]".

**Reason for Amendment:** This amendment inserts a cross reference providing that offense conduct constituting arson or property destruction by explosives is to be treated under § 2K1.4 (Arson, Property Destruction by Explosives) if the resulting offense level obtained under that section is greater. Because arson, or

property damage by use of explosives, is an aggravated form of property destruction, just as armed robbery is an aggravated form of robbery, the use of the same "relevant conduct" standard to determine the offense level is appropriate.

**8. Proposed Amendment:** Section 2B3.1(b)(5) is amended by deleting "obtaining", and by deleting "the object of the offense" and inserting in lieu thereof "taken".

The Commentary to § 2B3.1 captioned "Application Notes" is amended by deleting Note 5, and by renumbering Notes 6, 7, and 8 as 5, 6, and 7 respectively.

The Commentary to § 2B3.1 captioned "Background" is amended by deleting the second paragraph in its entirety.

Section 2B2.1(b)(3) is amended by deleting "obtaining", and by deleting "an object of the offense" and inserting in lieu thereof "taken".

The Commentary to § 2B2.1 captioned "Application Notes" is amended by deleting Note 2, and by renumbering Notes 3 and 4 as 2 and 3, respectively.

Section 2B2.2(b)(3) is amended by deleting "obtaining", and by deleting "an object of the offense", and by inserting in lieu thereof "taken".

The Commentary to § 2B2.2 captioned "Application Notes" is amended by deleting Note 2, and by renumbering Notes 3 and 4 as 2 and 3, respectively.

**Reason for Amendment:** This amendment provides that the specific offense characteristic related to the taking of a firearm or controlled substance applies whenever such item is taken. Attempts or conspiracies to take such an item would be covered under § 2X1.1.

**9. Proposed Amendment:** Section 2B3.1(b)(1) is amended by deleting "robbery or attempted robbery".

**Reason for Amendment:** This amendment deletes unnecessary and potentially confusing language. Application of § 2X1.1 requires the same result not only in the case of an attempt, but also in the case of conspiracy or solicitation.

**10. Proposed Amendment: Option 1:** Section 2B3.1 is amended by inserting the following additional subsection:

### (c) Special Instruction:

(1) If the defendant, as part of the same course of conduct or common scheme or plan as the offense of conviction, committed one or more additional robberies apply Chapter Three, Part D (Multiple Counts) as if the defendant had been convicted of a separate count for each such robbery".

The Commentary to § 2B3.1 captioned "Application Notes" is amended by inserting the following additional Note:

"9. Separate robberies are not grouped together under § 3D1.2(a-d). The special instruction at § 2B3.1(c) provides that where the defendant committed an additional robbery or robberies as part of the same course of conduct or common scheme or plan as the offense of conviction, the offense level will be determined as if the defendant had been convicted on a separate count for each such robbery (whether or not the defendant was actually convicted of each such robbery). The restriction in this provision to robbery offenses that are part of the same course of conduct or common scheme or plan as the offense of conviction coincides with the restriction on the scope of relevant conduct under subsection (a)(2) of § 1B1.3 (Relevant Conduct)."

Option 2: Section 2B3.1(b) is amended by inserting the following additional subsection:

"(7) If the defendant committed one or more additional robberies, increase by 2 levels. Do not apply this adjustment, however, if the defendant is convicted of more than one robbery."

The Commentary to § 2B3.1 is amended by inserting the following additional Note:

"9. When the defendant is convicted of more than one robbery, the multiple count rules of Chapter Three, Part D (Multiple Counts) will apply in lieu of specific offense characteristic (b)(7)."

**Reason for Amendment:** This amendment addresses a concern that the guidelines may result in lower sentences in certain multiple robbery cases than under pre-guidelines practice. This may occur when the prosecutor accepts a plea to only one count of robbery where the defendant in fact has committed several robberies, because the additional robberies would not be taken into account by the guidelines. Under past practice, the court was unconstrained in considering such circumstances (within the maximum sentenced authorized by statute for the count or counts of which the defendant was convicted). Where additional robberies were found to have been committed by the defendant, the Parole Commission guidelines expressly considered such conduct. Because such cases are serious and not infrequent, the proposed amendment would expressly provide for the inclusion of such conduct in the guidelines. As with pre-guideline practice, the sentence imposed under each option could not exceed the maximum authorized by statute for the count or counts of which the defendant was actually convicted. Under Option 1, the case would be treated as if the defendant had been convicted of each

robbery provided that the court determined both that the defendant committed the additional robbery or robberies, and that such robbery or robberies were part of the same course of conduct or common scheme or plan of the offense of conviction. The limitation to 'same course of conduct or common scheme or plan as the offense of conviction' coincides with that in § 1B1.3(a)(2).

Under Option 2, a 2-level increase would be provided if the defendant committed an additional robbery, whether or not part of the same course of conduct or common scheme or plan as the offense of conviction. This adjustment would not apply, however, where the defendant was actually convicted of more than one robbery; in that case, the rules of Chapter Three, Part D (Multiple Counts) would apply instead.

The Commission seeks comment on both options. In addition, in respect to Option 1, the Commission seeks comment on whether it should adopt a specific definition of same course of conduct or common scheme or plan in respect to robbery offenses and, if so, the appropriate content for this definition.

**Proposed Amendment:** Section 2B3.2(a) is amended by deleting "18" and inserting in lieu thereof "20".

Section 2B3.2(b)(1) is amended by deleting "\$2,500" and inserting in lieu thereof "\$10,000".

**Reason for Amendment:** Prior to the 1989 amendments, robbery and extortion had the same base offense level of 18. In 1989, the Commission raised the offense for robbery to 20, but did not address the extortion guideline. The proposed amendment increases the base offense level for extortion to level 20 to conform it to the robbery base offense level.

#### CHAPTER TWO, PART B (OFFENSES INVOLVING PROPERTY) AND PART F (OFFENSES INVOLVING FRAUD OR DECEIT)

**12. Proposed Amendment:** Section 2B1.1(b) is amended by inserting the following additional specific offense characteristic:

"(7) If the offense substantially jeopardized the safety and soundness of a federally insured financial institution, and the offense level determined above is less than level 24, increase to level 24."

Section 2B4.1(b) is amended by deleting "Characteristic" and inserting in lieu thereof "Characteristics", and by inserting the following additional specific offense characteristic:

"(2) If the offense substantially jeopardized the safety and soundness of a federally insured financial institution, and the offense level determined above is less than level 24, increase to level 24."

Section 2F1.1(b) is amended by inserting the following additional specific offense characteristic:

"(6) If the offense substantially jeopardized the safety and soundness of a federally insured financial institution, and the offense level determined above is less than level 24, increase to level 24."

**Reason for Amendment:** This amendment implements the following statutory directive in Section 961(m) of Public Law 101-73: "Pursuant to section 994 of title 28, United States Code, and section 21 of the Sentencing Act of 1987, the United States Sentencing Commission shall promulgate guidelines, or amend existing guidelines, to provide for a substantial period of incarceration for a violation of, or a conspiracy to violate, section 215, 656, 657, 1005, 1006, 1007, 1014, 1341, 1343, or 1344 of title 18, United States Code, that substantially jeopardizes the safety and soundness of a federally insured financial institution."

Comment is requested on whether the above formulation is the most appropriate way of implementing this directive or whether graduated minimum offense levels should be based upon the size of the financial institution affected.

#### CHAPTER TWO, PART D (OFFENSES INVOLVING DRUGS)

**13. Proposed Amendment:** The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 11 by inserting "in the table below" immediately before "to estimate", by deleting "Bufotenine at 1 mg per dose = 100 mg of Bufotenine" and inserting in lieu thereof "Mescaline at 500 mg per dose = 50 gms of mescaline", and by deleting "common controlled substances" and inserting in lieu thereof "certain controlled substances. Do not use this table if a more reliable estimate of the total weight is available from case specific information".

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 11 by deleting the following from the table captioned "Typical Weight Per Unit (Dose, Pill, or Capsule) Table":

"Bufotenine.....	1 mg
Diethyltryptamine.....	60 mg
Dimethyltryptamine.....	50 mg
"Barbiturates.....	100 mg
Glutethimide (Doriden).....	500 mg
"Thiobarbital.....	50 mg

by inserting an asterisk immediately after each of the following:

"LSD [Lysergic acid diethylamide]", "MDA", "PCP", "Psilocin", "Psilocybin", "2,5-Dimethoxy-4-methylamphetamine (STP, DOM)", "Methaqualone", "Amphetamine", "Methamphetamine", "Phenmetrazine (Preludin)".

and by inserting the following at the end:

"For controlled substances marked with an asterisk, the typical weight per unit shown is the weight of the actual controlled substance, and not necessarily the weight of the mixture or substance containing the controlled substance. Therefore, use of this table provides a very conservative estimate of the total weight."

**Reason for Amendment:** This amendment makes clear that the "Typical Weight Per Unit Table" in Note 11 of the Commentary to § 2D1.1 is not to be used where a more reliable estimate of the weight of the mixture or substance containing the controlled substance is available from case specific information. This amendment also makes clear that for certain controlled substances this table provides an estimate of the weight of the actual controlled substance, not necessarily the weight of the mixture or substance containing the controlled substance, and therefore use of this table in such cases will provide a very conservative estimate. Finally, this amendment deletes listings for several controlled substances that are generally legitimately manufactured and then unlawfully diverted; in such cases, more accurate weight estimates can be obtained from other sources (e.g., from the Drug Enforcement Administration or the manufacturer).

**14. § 2D1.1—Drug Quantity and Drug Equivalency Tables.** Where there are different controlled substances, Application Note 10 of the Commentary to § 2D1.1 provides a method for combining the quantities of the different controlled substances in order to apply the Drug Quantity Table at § 2D1.1(c) to produce a single offense level. This is accomplished by transforming each controlled substance to an "equivalent" amount of heroin or marihuana. Note, however, that for certain controlled substances (Schedule I and II Depressants, and Schedule III, IV, and V controlled substances), the maximum offense levels provided in the Drug Quantity Table at § 2D1.1(c) are capped at less than level 43, in recognition of the lower statutory sentences authorized for offenses involving these substances in comparison, for example, to heroin or

cocaine (e.g., the maximum offense level is 20 for a Schedule I or II depressant or a Schedule III substance, 12 for a Schedule IV substance, and 8 for a Schedule V substance). The Commission has become aware that in certain types of cases, the instructions in Application Note 10 of the Commentary in respect to certain combinations involving Schedule I or II depressants, or Schedule III, IV, and V substances, appear to override the capped offense levels provided for such substances in the Drug Quantity Table at guideline 2D1.1(c).

Illustrations of these two types of cases follow:

(1) Under § 2D1.1(c)(12), 20 kg or more of any Schedule III substance is level 20. Therefore, the offense level for 45 kg of either aprobarbital or allobarbital is level 20. However, because the drug equivalency tables convert such substances to marihuana, and marihuana is not capped at level 20, application of the conversion procedure to 40 kg of allobarbital and 10 grams of aprobarbital (a smaller total quantity) produces an offense level of 24 (a substantially higher offense level).

(2) Under § 2D1.1(c)(12), 40 kg of allobarbital is level 20; under the Drug Equivalency Tables, 1 gm of allobarbital = 2 gm of marihuana. Under the conversion procedure of Application Note 10, 40 kg of allobarbital and 1 gm of marihuana would produce an offense level of 24, a four level increase in offense level due to a single gram of marihuana.

One approach to address this issue would be to insert specific instructions in Application Note 10 that limit the conversions of Schedule I or II depressants, and Schedule III, IV, and V substances to their capped equivalents of marihuana and heroin (for example, in the case of Schedule IV substances, an instruction that the equivalent weight of all Schedule IV substances, or all Schedule IV and V substances taken together, shall not exceed 4.99 grams of heroin or 4.99 kilograms of marihuana). In U.S. v. Gurgiolo (1990 U.S. App. LEXIS 518 (January 12, 1990)), the Court of Appeals for the Third Circuit recently remanded a multiple controlled substance case for resentencing with instructions to limit the contribution of a Schedule III controlled substance to the capped equivalent amount of heroin. Another approach would be to amend § 2D1.1(c) (the Drug Quantity Table) to remove the capped maximum offense levels for Schedule I or II depressants, and Schedule III, IV, and V substances, and provide increased offense levels for larger amounts of these substances (in relation to the equivalencies set forth in

the Drug Equivalency Tables).

**15. § 2D1.2—Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals.** Comment is requested on whether the Commentary to § 2D1.2 should be amended to provide that the offense level from § 2D1.1 refers to the offense level from § 2D1.1 applicable to the entire quantity of drugs involved in the same course of conduct or common scheme or plan (see § 1B1.3(a)(2)). Or, should § 2D1.2 be amended to distinguish cases in which only a portion of the drugs involved meets the criteria of this guideline (e.g., an offense involving several sales, only one of which is near a "protected" location); and if so, how should this be accomplished?

**16. Proposed Amendment:** Section 2D1.6 is amended by deleting "12" and inserting in lieu thereof.

"(Apply the greater):

(1) The offense level from § 2D1.1 applicable to the underlying offense; or  
(2) 12."

The Commentary to § 2D1.6 is amended by inserting immediately before "Background" the following:

*"Application Notes:*

1. "Underlying offense" means the controlled substance offense committed, caused, or facilitated.

2. It is expected that, in the vast majority of cases, the offense level for the underlying offense will be level 12 or greater. An alternative base offense level of 12 is provided under subsection (a)(2) because it may not always be possible to determine the offense level for the underlying offense. In the rare case in which it can be determined that the offense level for the underlying offense is less than level 12, a downward departure to reflect the actual scale of the offense is recommended."

**Reason for Amendment:** This amendment is designed to reduce unwarranted disparity by requiring consideration of the amount of the controlled substance involved in the offense in the guideline itself, thus conforming this guideline section to the structure of §§ 2D1.1, 2D1.2, 2D1.4, and 2D1.5.

The statute to which this guideline applies (21 U.S.C. 843(b)) prohibits the use of a communications facility to commit, cause, or facilitate a felony controlled substance offense. Frequently, a conviction under this statute is the result of a plea bargain because the statute has a low maximum (four years with no prior felony drug conviction; eight years with a prior felony drug conviction) and no mandatory minimum.

The current guideline has a base offense level of 12 and no specific offense characteristics. Therefore, the scale of the underlying drug offense does not affect the guideline. This results in a departure being warranted in the vast majority of cases if the scale of the underlying drug offense is a permissible grounds for departure. The decision of the Second Circuit in U.S. v. Correa-Vargas, 860 F.2d 35 (1988), authorized a departure based upon the quantity of the controlled substance involved in the underlying offense.

Without guidance as to whether or how far to depart, the potential for unwarranted disparity is substantial. Under the proposed amendment, the guideline would take into account the scale of the underlying offense.

The Commission published a very similar amendment for comment last year but did not adopt it for transmission to Congress. Some comments expressed concern that the proposed amendment, by tying the offense level to the scale of the underlying offense, would make the "telephone count" statute to which this guideline applies overly attractive for plea bargaining in large scale cases (because the offense level, rather than being offense level 12 in each case as under the current guideline, would vary with the offense but the maximum sentence would be capped at four years). However, to the extent that a prosecutor desires this result, he can achieve it under the current guideline by obtaining a stipulation to the underlying conduct under § 1B1.2(a). Or, he can obtain a similar result by a plea to the general conspiracy statute (18 U.S.C. 371—5 year maximum), which would reference § 2D1.1 via § 2D1.4. Therefore, this amendment will not permit more plea bargaining than is currently authorized. It will, however, avoid disparity in the determination of whether and how far to depart based on the scale of the offense, because the scale of the offense will be included in the guideline itself. It will also help reduce confusion and disparity as to how the provisions of Chapter Three, Part B (Role in the Offense) apply to offenses under this guideline. In addition, because the offense level of the underlying offense will be recorded for each case (rather than all cases being recorded as level 12), it will tend to make any plea bargaining in respect to this offense more visible and easier to monitor.

**17. Proposed Amendment:** Chapter Two, Part D, Subpart 1 is amended by inserting as an additional guideline the following:

#### "2D1.11. Unlawfully Importing Exporting, Possessing, or Distributing Listed Chemicals and Certain Equipment

##### (a) Base Offense Level:

(1) The offense level from § 2D1.4 (Attempts and Conspiracies) determined as if the offense had constituted a conspiracy to manufacture a controlled substance.

##### Commentary

*Statutory Provisions:* 21 U.S.C. 841(d)(1), (2), 843(a)(6), (7), 960(d)(1) (2).

##### Application Notes:

1. As in the case of a conspiracy to manufacture a controlled substance, the scale of the offense frequently will have to be inferred from information such as the types and quantities of chemicals involved in relation to the types and quantities of controlled substances that typically are produced from such chemicals. See Application Note 2 of the Commentary to § 2D1.4 (Attempts and Conspiracies).".

**Reason for Amendment:** This amendment creates a new guideline covering offenses created by sections 6053, 6055, and 6057 of Anti-Drug Abuse Act of 1988. Under the proposed guideline, the offense level would vary with the type and amount of controlled substance that could be manufactured from a given amount of chemicals. That is, the offense would be treated as if it had constituted a conspiracy to manufacture a controlled substance. In some cases, however, it may not be possible to determine the scale of the offense with reasonable specificity. For this reason, comment is requested on whether an alternative base level should be included and, if so, the appropriate level.

**18. Proposed Amendment:** Section 2D2.1(a)(1) is amended by deleting "or an analogue of these" and inserting in lieu thereof "an analogue of the above, or cocaine base".

**Reason for Amendment:** This amendment specifies the appropriate offense level for possession of cocaine base ("crack") in cases not covered by the enhanced penalties created by section 6371 of the Anti-Drug Abuse Act of 1988.

#### CHAPTER TWO, PART F (OFFENSES INVOLVING FRAUD OR DECEIT)

**19. Proposed Amendment:** The Commentary to § 2F1.1 captioned "Application Notes" is amended in Note 7 by deleting "In keeping with the Commission's policy on attempts, if a probable or intended loss that the defendant was attempting to inflict can be determined, that figure would be used if it was larger than the actual loss. For example, if the fraud consisted of

attempting to sell", and inserting in lieu thereof "The following are additional examples: (1) If the fraud consisted of selling"; and by inserting "(2) If the offense consisted of selling fraudulently overvalued stock, the loss would be the amount by which the stock was overvalued." immediately following "this guideline.", and by inserting the following as an additional paragraph:

"In cases of partially completed conduct, the offense level is to be determined in accordance with the provisions of § 2X1.1 (Attempt, Solicitation, or Conspiracy). See Application Note 4 of the Commentary to § 2X1.1."

The Commentary to § 2F1.1 captioned "Application Notes" is amended in Note 8 by deleting "The amount of loss need not be precise. The court is not expected to identify each victim and the loss he suffered to arrive at an exact figure. The court" and inserting in lieu thereof "Where the exact loss is not readily ascertainable, the court, for the purposes of subsection (b)(1)".

The Commentary to § 2F1.1 captioned "Application Notes" is amended in Note 11 by deleting the last sentence and inserting in lieu thereof:

"In the case of an offense involving false identification documents or access devices, an upward departure may be warranted where the actual loss does not adequately reflect the seriousness of the conduct.".

**Reason for Amendment:** This amendment conforms the wording of the second sentence of Application Note 7 of § 2F1.1 to the fifth sentence of Application Note 2 of § 2B1.1. The reason for this amendment is to make clear that the treatment of attempts in fraud and theft is identical. The language of the Application Note in 2B1.1 is the more precise instruction. This amendment also adds an additional example to illustrate the determination of loss, clarifies Application Note 8 of the Commentary to § 2F1.1, and conforms the language of Application Note 11 to the language used elsewhere in the guidelines.

#### CHAPTER TWO, PART G (OFFENSES INVOLVING PROSTITUTION, SEXUAL EXPLOITATION OF MINORS, AND OBSCENITY)

**20. Proposed Amendment:** The Commentary to § 2G1.1 captioned "Application Notes" is amended in Note 3 by inserting the following at the end thereof:

"This factor would apply, for example, where the ability of the person being transported to appraise or control their conduct was substantially impaired by drugs or alcohol. In the case of transportation involving an adult, rather than a child, this

characteristic generally will not apply where the alcohol or drug was voluntarily taken.".

The Commentary to § 2G1.1 captioned "Application Notes" is amended in Note 5 by deleting ", distinct offense, even if several persons are transported in a single act" and inserting the following in lieu thereof:

"victim. Consequently, multiple counts involving the transportation of different persons are not to be grouped together under § 3D1.2 (Groups of Closely-related Counts). Special instruction (c)(1) directs that if the relevant conduct of an offense of conviction includes more than one person being transported, whether specifically cited in the count of conviction or not, then each such individual shall be treated as if contained in a separate count of conviction".

**Reason for Amendment:** This amendment clarifies the application of this guideline.

**21. Proposed Amendment:** Section 2G1.2 is amended by inserting the following at the end thereof:

**(d) Cross Reference**

(1) If the offense involved the defendant causing, transporting, permitting, or seeking a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply § 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material, Custodian Permitting Minor to Engage in Sexually Explicit Conduct, Advertisement for Minors to Engage in Production).

The Commentary to § 2G1.2 captioned "Statutory Provisions" is amended by deleting "§ 2423" and inserting in lieu thereof "§§ 2421, 2422, 2423".

The Commentary to § 2G1.2 captioned "Application Notes" is amended in Note 1 by deleting ", distinct offense, even if several persons are transported in a single act" and inserting the following in lieu thereof:

"victim. Consequently, multiple counts involving the transportation of different minors are not to be grouped together under § 3D1.2 (Groups of Closely-related Counts). Special instruction (c)(1) directs that if the relevant conduct of an offense of conviction includes more than one person being transported, whether specifically cited in the count of conviction or not, then each such individual shall be treated as if contained in a separate count of conviction".

The Commentary to § 2G1.2 captioned "Application Notes" is amended in Note 3 by inserting the following at the end thereof:

"This factor would apply, for example, where the ability of the person being transported to appraise or control their conduct was substantially impaired by drugs or alcohol".

The Commentary to § 2G1.2 captioned "Application Notes" is amended by inserting the following at the end thereof:

"4. 'Sexually Explicit Conduct,' as used in this guideline, has the meaning set forth in 18 U.S.C. 2256

5. The cross reference in (d)(1) is to be construed broadly and includes all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct."

**Conforming Amendment:** The Commentary to § 3A1.1 (Vulnerable Victim) captioned "Application Notes" is amended in Note 2 by inserting the following at the end:

"For example, where the offense guideline provides an enhancement for the age of the victim, this guideline should not be applied unless the victim was vulnerable for reasons unrelated to age".

**Reason for Amendment:** This amendment clarifies the application of this guideline. In addition, a cross-reference is inserted where the offense involves conduct that is more appropriately covered at § 2G1.1 to better reflect the severity of this conduct. The Commission, in addition, seeks comment on the appropriate relationship between this guideline and the guidelines in Chapter Two, Part A, Subpart 3 (Criminal Sexual Abuse).

**22. Proposed Amendment:** Section 2G2.1 is amended in the title by inserting ", Custodian permitting Minor to Engage in Sexually Explicit Conduct, Advertisement for Minors to Engage in Production" immediately following "Printed Material".

Section 2G2.1(b) is amended by deleting subsection (1) in its entirety and inserting the following:

"(1) If the offense involved a minor under the age of twelve years or who appears to be prepubescent, increase by 4 levels; otherwise, if the offense involved a minor under the age of 16 years, increase by 2 levels.

(2) If the defendant was a parent, relative, or legal guardian of the minor involved in the offense, or if the minor was otherwise in the custody, care or supervisory control of the defendant, increase by 2 levels.

**(c) Special Instruction**  
(1) If the offense involved the exploitation of more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the exploitation of each minor had been contained in a separate count of conviction".

The Commentary to § 2G2.1 captioned "Statutory Provisions" is amended by

deleting "8 U.S.C. 1328" and by inserting "(a), (b), (c)(1)(B)" immediately following "18 U.S.C. 2251".

The Commentary to § 2G2.1 captioned "Application Notes" is amended in Note 1 by inserting the following immediately after "(Groups of Closely-Related Counts)".

"Special instruction (c)(1) directs that if the relevant conduct of an offense of conviction includes more than one minor being exploited, whether specifically cited in the count of conviction or not, then each such minor shall be treated as if contained in a separate count of conviction".

The Commentary to § 2G2.1 captioned "Application Notes" is amended in Note 1 by inserting two new application notes as follows:

"2. Specific offense characteristic (b)(2) is intended to have broad application, and includes offenses involving a minor entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this adjustment, the court should look to the actual relationship that existed between the defendant and the child and not simply to the legal status of the defendant-child relationship.

3. If specific offense characteristic (b)(2) applies, no adjustment is to be made under § 3B1.3 (Abuse of Position of Trust or Use of Special Skill)."

The Commentary to § 2G2.1 captioned "Background Statement" is deleted in its entirety.

**Reason for Amendment:** This amendment provides consistent treatment of minor victims of sex offenses under the guidelines. The amendment also provides for an increase for those who abuse a position of private trust and exploit minor children and explains that characteristic with an application note. The special instruction is added to conform the operation of the multiple count rule in this guideline with related guidelines §§ 2G1.1, 2G1.2. Finally, an amendment to the statutory provisions removes 8 U.S.C. 1328 offenses from the direct operation of the guideline. These offenses are now brought under this guideline by the cross reference appearing in § 2G1.2. Further, the reference to section 2251 is made specific to the appropriate subsections.

**23. Section 2G2.2 is amended by deleting the guideline and inserting the following in lieu thereof:**

"§ 2G2.2 Transporting, Distributing, Receiving, Possessing With Intent To Sell, or Advertising To Receive Material Involving the Sexual Exploitation of a Minor

**(a) Base Offense Level:**

(1) 13, if the offense involved only possession or mere receipt of, or advertising for, pornographic materials; or

(2) 15, otherwise.

**(b) Specific Offense Characteristics**

(1) If the offense involved distribution for pecuniary gain, increase by the number of levels from the table at § 2F1.1(b)(1) corresponding to the retail value of the material, but in no event less than 6 levels.

(2) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.

(3) If the defendant sexually abused a minor at any time prior to the commission of the offense, and the offense level as determined above is less than 21, increase to level 21.

(4) If the material involved a minor under the age of twelve years or who appears to be prepubescent, increase by 4 levels; otherwise, if the material involved a minor under the age of 16 years, increase by 2 levels.

**(c) Cross Reference**

(1) If the offense involved the defendant causing, transporting, permitting, or seeking a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply § 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material, Custodian Permitting Minor to Engage in Sexually Explicit Conduct, Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.

**Commentary**

*Statutory Provision:* 18 U.S.C. 1460, 2251(c)(1)(A), 2252.

*Application Notes:*

1. Subsection (a)(1) applies to offenses committed under sections 1460 and 2251(c)(1)(A) of title 18 and to offenses committed under section 2252(a)(2) of title 18 involving only mere receipt of pornographic materials. Section 1460 prohibits possession with intent to sell on Federal lands or facilities or within the special maritime or territorial jurisdiction of the United States and carries a two-year maximum term of imprisonment. Section 2251(c)(1)(A) prohibits advertising for certain pornographic materials.

2. The commission of offenses under the statutes covered by this guideline, combined with prior criminal acts involving the sexual abuse of a minor is an extremely strong indicator of the danger which such an offender poses to the community because of the offender's propensity to commit future acts of sexual abuse. Historically, such prior acts have been considered by courts in substantially increasing penalties for offenses covered by this guideline. Specific offense characteristic (b)(3) applies to all prior felony

conduct involving the sexual abuse of a minor under either state or federal law, whether evidenced by conviction or other reliable information. Where the defendant has a previous conviction for an offense involving the sexual abuse of a minor, the adjustment under subsection (b)(3) is applied in lieu of adding points to the criminal history score for such a conviction in Chapter Four, Part A (Criminal History).

3. 'Sexually Explicit Conduct,' as used in this guideline, has the meaning set forth in 18 U.S.C. 2256.

4. The cross reference in (c)(1) is to be construed broadly and includes all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct."

**Conforming Amendments:** Appendix A is amended: in the line beginning "8 U.S.C. 1328" by deleting "2G2.1, 2G2.2"; in the line beginning "18 U.S.C. 1460" by inserting "2G2.2" immediately before 2G3.1; in the line beginning "18 U.S.C. 2251" by deleting "2251" and inserting in lieu thereof "2251 (a), (b), (c)(1)(B)"; and, by inserting in the appropriate place the following:

"2251(c)(1)(A), 2G2.2".

**Reason for Amendment:** This amendment provides an alternate base offense level that provides penalties that better reflect the severity of more grievous offenses, and provides specific offense characteristics for age, materials involving depictions of violence, and prior incidents of felonious sexual abuse of minors. The amendment also provides a cross-reference for offenses more appropriately sentenced under § 2G2.1.

24. Section 2G3.1 is amended by deleting the guideline and inserting the following in lieu thereof:

**§ 2G3.1 Importing, Mailing, or Transporting Obscene Materials Involving Adults**

**(a) Base Offense Level:**

(1) 15, if the offense involved distribution for pecuniary gain;

(2) 6, otherwise.

**(b) Specific Offense Characteristics**

(1) If the offense level is determined under subsection (a)(1), increase by the number of levels from the table at § 2F1.1(b)(1) corresponding to the retail value of the obscene matter.

(2) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, or material purporting to depict a person under the age of 18, increase by 4 levels.

**(c) Cross Reference**

(1) If the offense involved material depicting persons actually under the age of 18, apply § 2G2.2 (Transporting, Distributing, Receiving, Possessing with

Intent to Sell, or Advertising to receive Material Involving the Sexual Exploitation of a Minor).

**Commentary**

*Statutory Provisions:* 18 U.S.C. 1460–1463, 1465–1466, 1735, 1737.

*Application Notes:*

1. 'Distribution,' as used in this guideline includes production, transportation, mailing, and possession with intent to distribute.

2. 'Material purporting to depict a person under the age of 18' means photographs or other visual depictions of adults disguised as, or otherwise portraying, children. The fact that such materials may contain statements that the persons depicted therein are above the age of 18 does not preclude application of this adjustment."

**Reason for Amendment:** This amendment provides penalties that more adequately reflect the severity of more egregious offenses sentenced under the guideline; provides a specific offense characteristic for offenses involving materials which purport to depict children; and provides a cross-reference for offenses involving materials which in fact depict children to ensure that the penalty for such offenses adequately reflect their severity.

**CHAPTER TWO, PART H (OFFENSES INVOLVING INDIVIDUAL RIGHTS)**

25. **Proposed Amendment:** Section 2H1.1 is amended in the title by inserting "Conspiracy to Interfere with Civil Rights" before "Going".

Section 2H1.2 is amended by deleting the guideline and commentary.

**Reason for Amendment:** This amendment eliminates unnecessary duplication within the guidelines, and raises the minimum base offense level from level 13 to level 15 for cases currently covered under § 2H1.2 to better reflect the severity of this offense.

26. **Chapter Two, Part H, Subpart 1—** The Commission takes note of an increase in the frequency of "hate crimes" and other offenses intended to deprive persons of civil or political rights. The Commission seeks comment on whether the sentencing guidelines in part H, subpart 1 of chapter 2 provide penalties that adequately reflect the severity of felony violations of the Federal civil rights statutes contained in title 18 and title 42 of the United States code.

Specifically, section 241 of title 18, which prohibits conspiracies to interfere with civil rights, provides a maximum penalty of 10 years imprisonment, increased to life imprisonment where death results from the offense. Sections 242 through 245 of title 18 and section

3136 of title 42 include felony provisions carrying penalties of a maximum of 10 years imprisonment for various civil rights offenses that involve bodily injury and any term of years or life imprisonment where death results from the commission of such offenses. Additionally, section 247 of title 18 prohibits destruction of religious property and the obstruction of the free exercise of religious belief and includes felony provisions carrying penalties of a maximum of 10 years imprisonment where serious bodily injury occurs and any term of years or life imprisonment where death results from the commission of the offense.

Generally, the guidelines in part H, subpart 1 of chapter 2 provide penalties for violations of those statutes based upon the following calculation. First, alternate base offense levels are available whereby the greater of a fixed base offense level(s) or 2 levels in addition to the offense level applicable to any underlying offense is selected. Additionally, a specific offense characteristic providing a 4 level increase is provided where the defendant was a public official at the time of the offense. For example, if a defendant were sentenced under § 2H1.2 (Conspiracy to Interfere with Civil Rights) his base offense level would be the greater of level 13 or 2 levels plus the offense level applicable to any underlying offense (e.g., aggravated assault, kidnapping, or arson). If the defendant was a public official at the time of the offense, an additional 4 levels would be added to the offense level.

The Commission solicits comments on whether the guidelines in part H, subpart 1 of chapter 2 adequately reflect the seriousness of felony violations of Federal civil rights statutes. Specifically, the Commission seeks comments on the following issues:

1. Whether an increase (as currently provided) of 2 levels over the offense level applicable to any underlying offense is sufficient to adequately reflect the increased harm such crimes inflict on society when they are used as a means of insidious discrimination or to suppress the exercise or enjoyment of Federal rights; if not, should the Commission amend sections 2H1.1(a)(2), 2H1.2(a)(2), 2H1.3(a)(3) and 2H1.5(a)(2) by deleting "2" and inserting "4" in lieu thereof and by making comparable revisions to section 2H1.4;

2. Whether any chapter 3 general adjustment the Commission may adopt for offenses that are not prosecuted as civil rights offenses yet nevertheless involve the infliction, or intended infliction, of any harm motivated at least

in part by the victim's status with respect to race, color, religion, alienage, or national origin or by the victim's exercise or enjoyment, or intended exercise or enjoyment, of any right or privilege secured under the Constitution or laws of the United States (see proposed amendment 49) should have the same or a comparable structure and/or adjustment levels as the guidelines in part H, subpart 1 of chapter 2.

3. Whether the Commission should provide a general adjustment in chapter 3 where offenses have been committed by public officials under color of law or otherwise under the cloak of official duty or authority (in cases other than described above) that is distinct from the provision in § 3B1.3 (Abuse of Position of Trust or Use of Special Skill); and, if so, whether the amount of such an adjustment should be the same as the 4-level increase for public officials contained in the guidelines in part H, subpart 1 of chapter 2.

Finally, the Commission welcomes comments concerning any issues relevant to the operation of the guidelines in part H, subpart 1 of chapter 2.

## CHAPTER TWO, PART J (OFFENSES INVOLVING THE ADMINISTRATION OF JUSTICE)

27. Proposed Amendment: Section 2J1.6 is amended by inserting the following additional subsection.

### "(c) Cross Reference

- (1) If the offense constituted a failure to report for service of sentence, apply § 2P1.1 (Escape, Instigating or Assisting Escape)."

**Reason for Amendment:** This amendment adds a cross reference providing that failure to surrender for sentence will be treated under § 2P1.1 rather than § 2J1.6. That is, such conduct will be treated as equivalent to an escape.

## CHAPTER TWO, PART K (OFFENSES INVOLVING PUBLIC SAFETY)

28. Proposed Amendment: Section 2K1.4 is deleted in its entirety, including title and accompanying commentary, and the following inserted in lieu thereof:

### "§ 2K1.4. Arson; Property Damage by Use of Explosives

- (a) Base Offense Level (Apply the Greatest):

- (1) 24, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense, and that risk was created intentionally, or (B)

involved the destruction or attempted destruction of a dwelling;

- (2) 20, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense; (B) involved the destruction or attempted destruction of a structure other than a dwelling; or (C) endangered a dwelling, or a structure other than a dwelling;

- (3) 2 plus the offense level from § 2F1.1 (Fraud and Deceit) if the offense was committed in connection with a scheme to defraud; or

- (4) 2 plus the offense level from § 2B1.3 (Property Damage or Destruction).

### (b) Specific Offense Characteristic

- (1) If the offense was committed to conceal another offense, increase by 2 levels.

### (c) Cross Reference

- (1) If death resulted, or the offense was intended to cause death or serious bodily injury, apply the most analogous guideline from Chapter Two, Part A (Offenses Against the Person) if the resulting offense level is greater than that determined above.

## Commentary

*Statutory Provisions:* 18 U.S.C. 32, 33, 81, 844 (f), (h) (only in the case of an offense committed prior to November 18, 1988), (i), 1153, 1855, 2275.

## Application Notes:

1. If bodily injury resulted an upward departure may be warranted. See Chapter Five, Part K (Departures).

2. Creating a substantial risk of death or serious bodily injury includes creating that risk to fire fighters and other emergency and law enforcement personnel who respond to or investigate an offense."

**Reason for Amendment:** The Commission has determined that the current guideline is unclear in a number of respects and, in addition, does not adequately reflect the seriousness of the offenses typically prosecuted under the statutes that it covers. The proposed amendment restructures this guideline to provide more adequate offense levels and greater clarity.

29. Proposed Amendment: Section 2K1.6(a) is amended by deleting "greater" and inserting in lieu thereof "greatest" and by inserting the following additional subdivision:

- (3) If death resulted, apply the most analogous guideline from Chapter Two, Part A, Subpart 1 (Homicide)."

**Reason for Amendment:** This amendment adds an additional alternative base offense level to cover the situation in which the commission of this offense actually results in death.

**30. Proposed Amendment:** Section 2K1.7 is amended by inserting "(a)" immediately before "If", and by inserting the following additional subsection:

**"(b) Special Instruction for Fines**

(1) Where there is a federal conviction for the underlying offense, the fine guideline shall be the fine guideline that would have been applicable had there only been a conviction for the underlying offense. This guideline shall be used as a consolidated fine guideline for both the underlying offense and the conviction underlying this section.".

The Commentary to § 2K1.7 captioned "Application Notes" is amended by inserting the following additional notes:

"3. Where a sentence under this section is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for the use of fire or explosives is not to be applied in respect to the guideline for the underlying offense.

4. Subsection (b) sets forth special provisions concerning the imposition of fines. Where there is also a conviction for the underlying offense, a consolidated fine guideline is determined by the offense level that would have applied to the underlying offense absent a conviction under 18 U.S.C. 844(h). This is because, in such cases, the offense level for the underlying offense may be reduced as any specific offense characteristic for use of fire or explosive would not be applied (see Application Note 3). The Commission has not established a fine guideline range for the unusual case in which there is no conviction for the underlying offense, although a fine is authorized under 18 U.S.C. 3571."

**Conforming Amendment:** The Commentary to § 2K2.4 captioned "Application Notes" is amended in Note 4 by inserting ", although a fine is authorized under 18 U.S.C. 3571" immediately before the period at the end of the last sentence.

**Reason for Amendment:** This amendment conforms § 2K1.7 to § 2K2.4, which includes specific instructions concerning treatment of fines and double counting. Both sections are based upon similarly written statutes that provide for a fixed mandatory consecutive sentence of imprisonment. In addition, the last sentence of Application Note 4 of the Commentary to § 2K2.4 is expanded for greater clarity.

**31. Armed Career Criminals.** The Commission is considering a guideline for defendants sentenced under 18 U.S.C. 924(e), a statutory sentence enhancement to a conviction under 18 U.S.C. 922(g) carrying a mandatory minimum penalty of fifteen years' imprisonment and a maximum of life. This statute, the content of which is similar to the career offender guideline

(§ 4B1.1), is specifically designed to punish repeat offenders.

Concerns about section 924(e) sentences center around situations where the court wishes to impose a sentence above the mandatory minimum of fifteen years. Under the current Guidelines, some have found that they could not do so because the guideline for the count of conviction (18 U.S.C. 922(g)-§ 2K2.1) carries an offense level of 12. Because that offense level provides for a sentence well below the statutory minimum, even at criminal history level VI, the statutory minimum automatically becomes the guideline sentence. See § 5G1.1(b). Thus, any sentence of more than fifteen years requires a departure from the guidelines.

Just as there is a guideline range for career offenders, this amendment would create a guideline permitting a range of sentences above the statutory minimum for defendants sentenced under 18 U.S.C. 924(e).

Two options under consideration are shown below:

**Proposed Amendment:** Chapter Two, Part K, Subpart 2 is amended by inserting the following additional guideline:

**Option 1**

**"§ 2K2.6. Armed Career Criminal**

**(a) Base Offense Level: 34.**

**(b) Specific Offense Characteristics**

(1) If, in connection with the use of the weapon or ammunition, a victim sustained death, increase by 5 levels; permanent or lifethreatening injury, increase by 4 levels; serious bodily injury, increase by 3 levels; bodily injury, increase by 2 levels;

**(c) Cross Reference**

(1) If the defendant used or possessed the weapon or ammunition in committing or attempting another offense, apply the guideline for such other offense, or § 2X1.1 (Attempt Solicitation, or Conspiracy), if the resulting offense level is greater than that determined above.

**(d) Special Instruction**

(1) If the defendant's criminal history category is less than Category III, increase to Category III.

**Commentary**

**Statutory Provisions:** 18 U.S.C. 922(g); 924(e).

**Background:** This section implements 18 U.S.C. 924(e), which requires a minimum sentence of imprisonment for fifteen years for a defendant who violates 18 U.S.C. 922(g) and has three previous convictions for a violent felony or a serious drug offense. Setting the criminal history category at a minimum of Category III is designed to take into account the seriousness of the prior convictions of the defendant. If the criminal history as

computed under Chapter Four is higher than Category III, then the higher Criminal History Category shall apply."

**Conforming Amendments:** The Commentary to § 2K2.1 captioned "Statutory Provisions" is amended by inserting "(except when sentence is imposed under 18 U.S.C. 924(e), then apply § 2K2.6)" immediately following "(g)".

**Appendix A (Statutory Index)** is amended in the line beginning "18 U.S.C. 922(g)" by inserting ", 2K2.6 (when sentence is imposed under 18 U.S.C. 924(e))" immediately following "2K2.1".

**Appendix A (Statutory Index)** is amended by inserting the following in the appropriate order by title and section:

"18 U.S.C. 924(e) 2K2.6."

**Option 2**

**"§ 2K2.6 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition by Convicted Drug or Violent Felon**

**(a) Base Offense Level: 34,** if the defendant is subject to sentencing under 18 U.S.C. 924(e).

**(b) Specific Offense Characteristics**

**(1) Use the greater of (A) or (B):**

(A) If a victim sustained serious bodily injury or death in connection with an offense resulting in a prior conviction or in connection with the instant offense, increase the offense level by 4 levels if the injury was permanent or life-threatening or if death resulted; increase by 2 levels otherwise.

(B) If a prior conviction was for a sexual abuse felony; or if the instant offense involves conduct not included in a count of conviction that would constitute a felony under chapter 109A of title 18, United States Code, increase by 2 levels.

(2) If, in connection with an offense resulting in a prior conviction or in connection with the instant offense, a dangerous weapon (including a firearm) was used or brandished, increase by 4 levels.

(3) If an offense resulting in a prior conviction involved a quantity of controlled substances specified in 21 U.S.C. 841(b)(1) (A) or (B), increase by 2 levels.

(4) If the instant offense involved a loaded firearm or both an unloaded firearm and ammunition that could be used in the firearm, increase by 2 levels.

**(c) Cross Reference**

If the guideline applicable to the underlying conduct produces a higher offense level, apply that guideline.

**(d) Special Instruction**

If the defendant's criminal history category is less than Category III, increase to Category III. This instruction operates regardless of whether the cross-reference in subsection (c) applies or there are multiple counts of conviction.

#### Commentary

*Statutory Provisions:* 18 U.S.C. 922(g) and 924(e).

#### Application Notes:

1. To determine whether any of the specific offense characteristics are applicable, the relevant conduct rules of § 1B1.3 apply, regardless of whether the offense is a prior offense or the instant offense.

2. The specific offense characteristics relating to prior convictions are to be applied to those prior convictions set out in 18 U.S.C. 924(e).

3. If a prior conviction would result in an enhancement under more than one specific offense characteristic, apply only the specific offense characteristic resulting in the greatest enhancement.

4. If any specific offense characteristic from this section applies on the basis of a previous conviction, do not include such conviction in the calculation of the criminal history score under Chapter Four, unless the cross reference in subsection (c) applies. If subsection (c) applies calculate defendant's criminal history score under Chapter Four, taking into account all prior sentences subject to that chapter.

5. The specific offense characteristic in subsection (b)(1)(B) includes conduct that would constitute a felony under chapter 109A of title 18, United States Code, regardless of whether the conduct occurred within the special maritime and territorial jurisdiction of the United States.

Section 2K2.1(c) is amended by inserting at the end:

"(3) If the defendant is subject to sentencing under 18 U.S.C. 924(e), apply § 2K2.6."

**Background:** This section implements 18 U.S.C. 924(e), which requires a minimum sentence of imprisonment for fifteen years for a defendant who violates 18 U.S.C. 922(g) and has three previous convictions for a violent felony or a serious drug offense. This section incorporates factors relating to the seriousness and specific nature of the defendant's past offenses and adopts a more detailed approach to criminal history, as appropriate to the requirements of section 924(e), than does Chapter Four. Chapter Four does not address the specific nature of the defendant's past criminal conduct but is based primarily on the number of convictions and, to a limited extent, the length of sentence. For criminal history purposes generally, Chapter Four treats a conviction for a felony resulting in a twenty-year sentence in the same manner as one resulting in a fourteen-

month sentence. Moreover, the criminal history score determined under Chapter Four does not use an alternate measure of the seriousness of past criminal conduct, such as injury caused or use of a weapon. Because Congress has required a minimum sentence of fifteen years' imprisonment for persons sentenced under 18 U.S.C. 924(e) as a result of past violent or drug convictions, greater refinement in assessing criminal history is needed under this provision. To guard against double counting, Application Note 3 provides that if a prior conviction results in an increase in the offense level under this guideline, such conviction should not be used in the calculation of the criminal history score under Chapter Four."

In addition, the Commission is considering the following issues as relating to the proposed guideline:

Should the Commission provide a three-level enhancement if the defendant used the weapon or ammunition in connection with the commission of a violent felony as a specific offense characteristic? Should the Commission provide a two-level enhancement as a specific offense characteristic if the defendant used the weapon or ammunition in connection with the commission of a serious drug offense?

The Commission also seeks comment on possible alternative guideline solutions for addressing these problems. Such alternatives may be designed to similarly raise the sentence for those who possess firearms and have the requisite priors, whether charged with a firearm count or not. The Commission seeks comment regarding the following:

1. Should a guideline be developed to provide enhancements for offenders who possess guns in connection with any instant offense and have prior convictions for violent or drug offenses?

2. Should the career offender guideline be amended to apply to all instant offenses involving possession of a gun? Or, should the guideline for 18 U.S.C. 924(e) cases be incorporated within § 2K2.1?

3. Should criminal history guidelines be amended to provide higher adjustments (more than the current three points) for each prior sentence (or convictions) involving violent or serious drug offenses? Should the number of criminal history categories be expanded to account for these?

4. Should a criminal history guideline be developed that provides additional enhancements for those who exhibit patterns of prior violent or serious drug offenses?

5. Should existing Chapter Two guidelines that incorporate violent activities or gun possession provide additional adjustments due to prior violent or serious drug convictions or sentences?

**32. Proposed Amendment:** Section 2K2.1(b)(1) is amended by inserting "other than a firearm covered in 26 U.S.C. 5845(a)." immediately following "ammunition".

Section 2K2.1(b) is amended by inserting the following additional specific offense characteristic:

"(3) If the instant offense involved the shipment, transportation, possession, or receipt of a loaded firearm or both an unloaded firearm and ammunition that could be used in the firearm, increase by 2 levels."

**Reason for Amendment:** This amendment provides that the reduction in offense level under subsection (b)(1) for possession of a weapon for sporting purposes or collection may not be applied in the case of any weapon described in 26 U.S.C. 5845(a).

In addition, the amendment inserts an additional subsection (b)(3) that provides a 2-level enhancement in every case in which the defendant is in possession of any loaded firearm or an unloaded firearm and ammunition that could be used in that firearm.

Furthermore, comment is requested as to whether an offender who is convicted of possessing a firearm or ammunition and has one or two prior serious drug or violent felony convictions but is not subject to sentencing under 18 U.S.C. 924(e) should be subject to a two-level enhancement under § 2K2.1 for each prior conviction of a serious drug offense or a violent felony?

**33. Proposed Amendment:** Chapter Two, Part K, Subpart 3 is amended by inserting the following additional guideline:

#### § 2K3.2. Feloniously Mailing Injurious Articles.

(a) **Base Offense Level (Apply the greater):**

(1) If the offense was committed with intent (A) to kill or injure any person, or (B) to injure the mails or other property, apply § 2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the intended offense; or

(2) If death resulted, apply the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide).

#### Commentary

*Statutory Provision:* 18 U.S.C. 1716 (felony provisions only).

**Background:** This guideline applies only to the felony provisions of 18 U.S.C. 1716. The Commission has not promulgated a guideline for the misdemeanor provisions of this statute."

**Reason for Amendment:** This amendment adds an additional guideline covering the felony provisions of 18 U.S.C. 1716.

## CHAPTER TWO, PART L (OFFENSES INVOLVING IMMIGRATION, NATURALIZATION, AND PASSPORTS)

**34. Proposed Amendment:** Section 2L1.1(b)(1) is amended by deleting "and without knowledge that the alien was excludable under 8 U.S.C. 1182(a) (27), (28), (29)."

The Commentary to § 2L1.1 captioned "Application Notes" is amended by deleting Application Note 6, formerly Note 7, and inserting in lieu thereof:

"7. Where the defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States to engage in subversive activity, an upward departure may be warranted."

**Reason for Amendment:** This amendment deletes a portion of specific offense characteristic (b)(1) that is unclear in application, and in any event rarely occurs, and replaces it with an application note indicating that an upward departure may be warranted in the circumstances specified.

**35. Proposed Amendment:** Section 2L1.1(b)(2) is amended by deleting:

"If the defendant previously has been convicted of smuggling, transporting, or harboring an unlawful alien, or a related offense, increase by 2 levels.", and inserting in lieu thereof:

"If the offense involved the smuggling, transporting, or harboring of six or more aliens, increase as follows:

Number of unlawful aliens smuggled, transported, or harbored	Increase in level
(A) 6-12 .....	add 2
(B) 13-24 .....	add 4
(C) 25-49 .....	add 6
(D) 50 or more .....	add 8."

The Commentary to § 2L1.1 captioned "Application Notes" is amended by deleting Note 2 and inserting in lieu thereof the following:

"2. The number of unlawful aliens smuggled, transported, or harbored does not include the defendant."

The Commentary to § 2L1.1 captioned "Application Notes" is amended in Note 8 in the first sentence by deleting "large numbers of aliens or," and by inserting immediately before the period at the end of the sentence ", or the reckless

endangerment of the safety of others in an effort to avoid apprehension for the offense (e.g., during a high speed chase)".

The Commentary to § 2L1.1 captioned "Application Notes" is amended by deleting Note 4, and renumbering Notes 5, 6, 7, and 8 as 4, 5, 6, and 7 respectively.

The Commentary to § 2L1.1 captioned "Background" is amended by deleting the last sentence.

**Conforming Amendments:** Section 2L2.1(b) is amended by deleting "Characteristic" and inserting in lieu thereof "Characteristics", and by inserting the following additional specific offense characteristic:

"(2) If the offense involved six or more documents, increase as follows:

Number of documents	Increase in level
(A) 6-12 .....	add 2
(B) 13-24 .....	add 4
(C) 25-49 .....	add 6
(D) 50 or more .....	add 8."

The Commentary to § 2L2.1 captioned "Application Note" is amended by deleting "Note" and inserting in lieu thereof "Notes" and by inserting the following additional Note:

"2. Where it is established that multiple documents are part of a set intended for use by a single person, treat the set as one document."

Section 2L2.3(b) is amended by deleting "Characteristic" and inserting in lieu thereof "Characteristics", and by inserting the following additional specific offense characteristic:

"(2) If the offense involved six or more passports, increase as follows:

Number of passports	Increase in level
(A) 6-12 .....	add 2
(B) 13-24 .....	add 4
(C) 25-49 .....	add 6
(D) 50 or more .....	add 8."

Section 3D1.2(d) is amended in the third paragraph by deleting "2L1.1, 2L2.1," and "2L2.3," and in the second paragraph by inserting in the appropriate place by section "§§ 2L1.1, 2L2.1, 2L2.3;".

The Commentary to § 3D1.2 captioned "Application Notes" is amended in Note 3 by deleting example 7.

**Reason for Amendment:** Currently, § 2L1.1 provides the same offense level for a defendant who smuggles, transports, or harbors 1, 6, 25, 50, or any number of aliens. The Commission attempted to address the scope of such

offenses in the initial guidelines by inserting specific offense characteristic (b)(2). However, this specific offense characteristic "prior conviction for the same or similar offense" simply is not a good proxy for the scale of the instant offense, and is inconsistent with the Commission's general approach to the treatment of prior criminal history.

The proposed amendment addresses these issues by substituting the number of aliens smuggled, transported, or harbored as a more direct measure of the scope and gravity of the offense. As under current guidelines, § 3B1.1 (Aggravating Role) will provide an additional increase of 4 or 2 levels for organizers, managers, and supervisors. Due to the nature of the offense, this role adjustment is particularly likely to apply in cases involving the transportation of large numbers of aliens.

The Commission requests comment on the appropriateness of the proposed adjustment both as to the number of aliens in each category and as to the increases in offense level associated with these numbers.

The proposed amendment also adds commentary to § 2L1.1 expressly indicating that an upward departure may be warranted for the reckless endangerment of the safety of others in an effort to avoid apprehension for the offense.

Sections 2L2.1 and 2L2.3 are also amended to provide equivalent increases.

**36. Proposed Amendment:** The caption of § 2L2.1 is amended by inserting the following at the end "; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law".

The Commentary to § 2L2.1 captioned "Statutory Provisions" is amended by inserting "8 U.S.C. 1325(b); immediately before "18 U.S.C.", and by inserting "1015 (c), (d)." immediately after "§§".

The caption of § 2L2.2 is amended by inserting the following at the end: "; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law".

The Commentary to § 2L2.1 captioned "Statutory Provisions" is amended by deleting "18 U.S.C." and inserting in lieu thereof "8 U.S.C. 1325(b); 18 U.S.C. 911, 1015(c)."

Appendix A (Statutory Index) is amended by inserting the following in the appropriate place by title and section:

"8 U.S.C. 1325(b)..... 2L2.1, 2L2.2";  
"18 U.S.C. 911..... 2F1.1, 2L2.2";  
"18 U.S.C. 1015(a)..... 2J1.3"

18 U.S.C. 1015(b).....	2F1.1
18 U.S.C. 1015(c).....	2L2.1, 2L2.2
18 U.S.C. 1015(d).....	2L2.1".

**Reason for Amendment:** This amendment makes the coverage of these offense guidelines more comprehensive by expressly including violations of 8 U.S.C. 1325, 18 U.S.C. 911, and 18 U.S.C. 1015.

#### CHAPTER TWO, PART M (OFFENSES INVOLVING NATIONAL DEFENSE)

**37. Proposed Amendment:** Section 2M4.1(b)(1) is amended by deleting "while" and inserting in lieu thereof "at a time when", and by deleting "into the armed services, other than in time of war or armed conflict" and inserting in lieu thereof "for compulsory military service".

The Commentary to § 2M4.1 captioned "Application Notes" is amended in the caption by deleting "Notes" and inserting in lieu thereof "Note", and by deleting Notes 1 and 2 in their entirety and inserting in lieu thereof:

"1. Subsection [b](1) does not distinguish between whether the offense was committed in peacetime or during time of war or armed conflict. If the offense was committed when persons were being inducted for compulsory military service during time of war or armed conflict, an upward departure may be warranted."

**Reason for Amendment:** As currently written, § 2M4.1 contains an anomaly in that the offense level for failure to register and evasion of military service in time of war or armed conflict is lower than during a peace time draft. This amendment corrects this anomaly. In addition, the amendment makes a technical correction to the language of the guideline that enables the elimination of current Application Note 1.

**38. Proposed Amendment:** Section 2M5.2 is amended by deleting subsection (a) in its entirety and inserting in lieu thereof: "(a) Base Offense Level: 22".

The Commentary to § 2M5.2 captioned "Application Notes" is amended in Note 1 by inserting the following immediately before "In the case of a violation":

"Under 22 U.S.C. 2778, the President is authorized, through a licensing system administered by the Department of State, to control exports of defense articles and defense services that he deems critical to the security and foreign policy of the United States. The items subject to control constitute the United States Munitions List, which is set out in 22 CFR 121.1. Included in this list are such things as military aircraft, helicopters, artillery, shells, missiles, rockets, bombs,

vessels of war, explosives, military and space electronics, and certain firearms.

The base offense level assumes that the offense conduct was harmful or had the potential to be harmful to a security or foreign policy interest of the United States. In the unusual case where the offense conduct posed no such risk, a downward departure may be warranted."

The Commentary to § 2M5.2 captioned "Application Notes" is amended in Note 2 by inserting "or foreign policy" immediately after "security".

**Reason for Amendment:** The proposed amendment creates a single base offense level of 22 to reflect the Commission's view of the serious nature of this type of offense. This base offense level assumes that the conduct was harmful or had the potential to be harmful to a security or foreign policy interest of the United States. Proposed Application Note 1 indicates that a downward departure may be warranted in the unusual case that lies outside the "heartland" described above.

#### CHAPTER TWO, PART N (OFFENSES INVOLVING FOOD, DRUGS, AGRICULTURAL PRODUCTS, AND ODOMETER LAWS)

**39. Proposed Amendment:** Section 2N1.1 is amended by inserting the following additional subsection:

##### "(b) Cross Reference

(1) If the offense involved extortion, apply § 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) if the resulting offense level is greater than that determined above."

**Reason for Amendment:** This amendment adds a cross reference to ensure that in the case of an offense involving extortion, the offense level will not be lower than that under § 2N1.2 (which contains a cross reference to § 2B3.2).

**40. Proposed Amendment:** Section 2N1.2(a) is amended by deleting "(Apply the greater)".

Section 2N1.2(a)(1) is amended by deleting "(1)", and by deleting the semicolon at the end and inserting in lieu thereof a period.

Section 2N1.2 is amended by deleting subsection (a)(2) in its entirety and inserting in lieu thereof:

##### "(b) Cross Reference

(1) If the offense involved extortion, apply § 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage)."

The Commentary to § 2N1.2 is captioned "Application Notes" is amended by deleting "Notes" and inserting in lieu thereof "Note", by deleting Note 1 in its entirety, and by redesignating Note 2 as Note 1.

**Reason for Amendment:** This amendment conforms the structure of this guideline to that used in other guidelines.

**41. Proposed Amendment:** The Commentary to § 2N2.1 captioned "Application Notes" is amended by deleting Note 2 in its entirety and inserting in lieu thereof:

"2. Where the indictment or information setting forth the count of conviction (or a stipulation as described in § 1B1.2(a)) establishes an offense more aptly covered by another guideline (e.g., theft, fraud, property destruction, bribery, or graft), apply that guideline rather than § 2N2.1. Otherwise, in such cases, § 2N2.1 is to be applied, but an upward departure from the guidelines may be considered."

The Commentary to § 2N2.1 captioned "Application Notes" is amended in Note 1 by inserting "or reckless" immediately before "conduct".

**Reason for Amendment:** This amendment conforms the language of Application Note 2 to the guideline at § 1B1.2 (see, for example, Application Note 13 of § 2F1.1). This amendment also makes a clarifying change in Application Note 1.

**42. Chapter Two, Part N, Subpart 2:** Section 2403 of the Anti-Drug Abuse Act of 1988 (codified as 21 U.S.C. 333(e)) prohibits distributing or possessing with intent to distribute anabolic steroids. The statute authorizes a maximum sentence of 3 years' imprisonment for "any person who distributes or possesses with the intent to distribute any anabolic steroid for any use in humans other than the treatment of disease pursuant to the order of a physician." A maximum sentence of 6 years' imprisonment is authorized for "any person who distributes or possesses with intent to distribute to an individual under 18 years of age, any anabolic steroid for any use in humans other than treatment of disease pursuant to the order of a physician." The Commission intends to promulgate an offense guideline to address this statute based upon the type and amount of steroids involved. The Commission seeks public comment on how to structure a guideline that will best accomplish this result, and as to the appropriate offense levels.

#### CHAPTER TWO, PART P (OFFENSES INVOLVING PRISONS AND CORRECTIONAL FACILITIES)

**43. Proposed Amendment:** The Commentary to § 2P1.1 captioned "Application Notes" is amended by the insertion of the following additional note:

"5. Where the defendant was serving a sentence of imprisonment at the time of the escape, criminal history points from § 4A1.1(d), or § 4A1.1 (d) and (e), may apply. The addition of criminal history points on the basis of the defendant's custody status at the time of the escape is expressly authorized by the guidelines and does not constitute inappropriate double counting."

**Reason for Amendment:** This amendment clarifies that, where the instant offense is escape, points from § 4A1.1 (d) or (e), or both, may be applicable and do not constitute unintended double counting. Although the 3rd Circuit U.S. v. Ofchinick, 1989 W.L. 59365, 1989 U.S. App. LEXIS 7819 (3d Cir. June 7, 1989) and 10th Circuit U.S. v. Goldbaum, No. 88-2239, 1989 U.S. App. LEXIS 10304, 2 Fed. Sent. R. 103 (1989) (10th Cir. July 21, 1989) have upheld the addition of criminal history points in such cases, several district courts have held to the contrary, e.g., U.S. v. Bell, Cr. File No. 5-88-021-01, 2 Fed. Sent. R. 106 (1989) (D. Minn. June 30, 1989), U.S. v. Cassidy, Crim. File No. 3-88-066 (D. Minn.) statement of reasons (no opinion), January 18, 1989 (Chief Judge Alsop), U.S. v. Evidente, Cr. File No. 5-88-003 (D. Minn.) order (no opinion), May 26, 1988 (Judge Renner). Because this issue is one of the Commission's intent, this amendment will resolve this issue and conserve judicial resources.

**44. § 2P1.1—Offense Levels for Certain Escapes:** Under the current guidelines, an escape from custody resulting from a conviction or a lawful arrest for a felony has a base offense level of 13. If, however, the escape is from non-secure custody and the defendant returns voluntarily within 96 hours, the base offense level is reduced by 7 levels to level 6. If the defendant does not return voluntarily within 96 hours, there is no difference in offense level between an escape from secure or non-secure custody.

The Commission seeks comment on whether an additional distinction should be made between escape from secure and non-secure custody for cases not covered by the 7 level reduction for voluntary return from an escape from non-secure custody within 96 hours.

The Commission also seeks comment on whether there should be any reduction for voluntary return and, if such a reduction is appropriate, whether the 96 hours distinction currently used is appropriate. Comment is also sought on whether any distinction between escape from secure and non-secure custody should take into account the nature of the offense for which the defendant is confined, or the security level of the institution in which the defendant is

confined. If a distinction between escape from secure and non-secure custody is appropriate, should or should not this distinction apply in the case of all offenders or should such a distinction not apply to certain offenders such as drug traffickers or violent offenders? Should a failure to return from a furlough from a secure institution be treated differently than a failure to return from a furlough from a non-secure institution? Where a defendant is returned to custody following an arrest for a new crime while on escape status, such return does not constitute a voluntary return for guideline purposes. Should the guidelines, however, provide an additional distinction to cover cases in which the defendant returns voluntarily from an escape and is later discovered to have committed a new offense while on escape status? If additional distinctions to the guidelines are believed warranted, comments are sought as to the most appropriate structure to accommodate such distinctions.

#### CHAPTER TWO, PART S (MONEY LAUNDERING AND MONETARY TRANSACTION REPORTING)

**45. Proposed Amendment:** The Introductory Commentary to Chapter Two, Part S, is deleted in its entirety.

**Reason for Amendment:** The introductory commentary to this part is outdated, inconsistent with the commentaries to other sections, and better covered in the individual commentaries to the offenses contained in the part.

#### CHAPTER TWO, PART T (OFFENSES INVOLVING TAXATION)

**46. Proposed Amendment:** The Commentary to § 2T1.1 captioned "Application Notes" is amended in Note 5 by deleting:

"'racketeering activity' as defined in 18 U.S.C. 1961. If § 2T1.1(b)(1) applies, do not apply § 4B1.3 (Criminal Livelihood), which is substantially duplicative".

and inserting in lieu thereof:

"conduct constituting a criminal offense under federal, state, or local law".

The Commentary to § 2T1.2 captioned "Application Notes" is amended in Note 1 by deleting:

"'racketeering activity' as defined in 18 U.S.C. 1961. If § 2T1.1(b)(1) applies, do not apply § 4B1.3 (Criminal Livelihood), which is substantially duplicative".

and inserting in lieu thereof:

"conduct constituting a criminal offense under federal, state, or local law".

The Commentary to § 2T1.3 captioned "Application Notes" is amended in Note 1 by deleting:

"'racketeering activity' as defined in 18 U.S.C. 1961. If § 2T1.1(b)(1) applies, do not apply § 4B1.3 (Criminal Livelihood), which is substantially duplicative",

and inserting in lieu thereof:

"conduct constituting a criminal offense under federal, state, or local law".

**Reason for Amendment:** The current application notes provide that where subsection (b)(1) produces an offense level of 12, § 4B1.3 (Criminal Livelihood) which produces an offense level of 13 is not to be applied. This conflicts with the principle in Application Note 5 of the Commentary to § 1B1.1 which provides that when two guideline provision are equally applicable, the one producing the greater offense level controls.

In addition, although the guidelines in §§ 2T1.1, 2T1.2, and 2T1.3 use the term criminal activity, the application notes refer to "racketeering activity" as defined in 18 U.S.C. 1961. Although the definition in 18 U.S.C. 1961 is quite broad, it is jurisdictional for some conduct (e.g., theft from interstate shipment is covered, but other felonious theft does not appear to be covered). This appears anomalous. This amendment deletes the portions of the application notes prohibiting application of § 4B1.3. In addition, the amendment revises the definition of criminal activity to cover any criminal violation of federal, state, or local law.

#### CHAPTER TWO, PART X (OTHER OFFENSES)

**47. Proposed Amendment:** Section 2X5.1 is amended by inserting immediately before the period at the end of the second sentence:

"except that any guidelines and policy statements that can be applied meaningfully in the absence of a Chapter Two offense guideline shall remain applicable".

The Commentary to § 2X5.1 is amended by inserting immediately after "Commentary" the following:

*"Application Notes:*

1. Guidelines and policy statements that can be applied meaningfully in the absence of a Chapter Two offense guideline include: § 5B1.3 (Conditions of Probation); § 5B1.4 (Recommended Conditions of Probation and Supervised Release); § 5D1.1 (Imposition of a Term of Supervised Release); § 5D1.2 (Term of Supervised Release); § 5D1.3 (Conditions of Supervised Release); § 5E1.1 (Restitution); subsection (c)(1)(B) of § 5E1.2 (Fines for Individual Defendants) as a lower limit; § 5E1.3 (Special Assessments); § 5E1.4 (Forfeiture); Chapter Five, Part F (Sentencing Options); § 5G1.3 (Imposition of a Sentence

on a Defendant Serving an Unexpired Term of Imprisonment); Chapter Five, Part H (Specific Offender Characteristics); Chapter Five, Part J (Relief from Disability); Chapter Five, Part K (Departures); Chapter Six, Part A (Sentencing Procedures); Chapter Six, Part B (Plea Agreements).

2. Where there is no sufficiently analogous Chapter Two offense guideline, the court may find it helpful to estimate a Chapter Two offense level by comparing the seriousness of the instant offense with the offense levels for offenses that are listed. This estimated offense level, although not a formal guideline determination, may be used in conjunction with reference to Chapters Three, Four, and Five to provide guidance for the determination of an appropriate sentence.".

**Reason for Amendment:** This amendment inserts an application note (Note 1) to clarify that in the case of an offense for which there is no sufficiently analogous offense guideline, any guidelines and policy statements that can be meaningfully applied in the absence of a Chapter Two offense guideline remain applicable. This amendment also provides an application note (Note 2) to assist the court in fashioning an appropriate sentence where there is no specifically analogous offense guidance.

#### CHAPTER THREE, PART A (VICTIM-RELATED ADJUSTMENTS)

48. Proposed Amendment: The Introductory Commentary to Chapter Three, Part A is amended by deleting the second sentence as follows: "They are to be treated as specific offense characteristics."

**Reason for Amendment:** This amendment eliminates an unnecessary and confusing sentence. Chapter Three adjustments are adjustments to the offense level determined under Chapter Two, not specific offense characteristics. This sentence creates confusion in respect to Chapter Two cross references because, when read in conjunction with § 1B1.5 (Interpretation of References to Other Guidelines), it can create the impression that a Chapter Three adjustment must somehow be taken out of sequence to become part of the Chapter Two offense level.

49. Proposed Amendment: Chapter Three, Part A is amended by inserting the following additional section:

#### “§ 3A1.4 Victim Due To Race, Color, Religion, Alienage, Or National Origin Or On Account Of Exercise Of Federal Rights

If the offense—

(a) Involved the infliction, or intended infliction, of any harm motivated at least in part by the victim's status with respect to race, color, religion, alienage, or national origin; or

(b) Was motivated at least in part by a victim's exercise or enjoyment, or intended exercise or enjoyment, of any right or privilege secured under the Constitution or laws of the United States,

increase by 2 levels.

#### Commentary

##### Application Notes:

1. Do not apply this adjustment if the defendant is sentenced under Chapter 2, part H, subpart 1 (Civil Rights), or where the offense guideline specifically incorporates this factor.

2. If the court determines that, under the circumstances of the offense, the race, color, religion, alienage, or national origin of the victim rendered the victim vulnerable under § 3A1.1 (Vulnerable Victim), do not apply this guideline.

3. Subsection (b) applies both to actions taken by private persons as well as public officials and should be construed broadly to protect the rights of free speech and assembly, the free exercise of religion, and other rights guaranteed under the Constitution or laws of the United States.

**Background:** This adjustment applies to 'hate crimes,' that is, offenses where the victim is made a target of criminal activity by the defendant on account of the victim's status with respect to race, color, religion, alienage, or national origin or because of the victim's exercise or intended exercise of a right guaranteed under the Constitution or laws of the United States. For example, this adjustment would apply to assaults committed against individuals on account of their race or color, offenses committed against organizations because of their exercise of the right to speak or assemble, and to crimes committed against religious entities on account of their beliefs or practices. This section also applies to political candidates and others who are targeted as victims of crime at least in part because of the beliefs which they espouse or other forms of advocacy in which they engage.

**Reason for Amendment:** This amendment provides a general penalty enhancement for "Hate Crimes" that are not prosecuted and sentenced under the civil rights laws and corresponding guidelines. The amendment provides an enhanced sentence for offenses motivated by the victim's race, national origin, etc. or where the offense was motivated by the victim's exercise of rights secured under the Constitution or laws of the United States, whether or not the defendant was acting under color of law. See also questions 2 and 3 at amendment 26.

50. Proposed Amendment: chapter three, part B, is amended by deleting the text of the "Introductory Commentary" in its entirety and inserting in lieu thereof:

"This part provides adjustments to the offense level based upon the role the

defendant played in committing the offense. Many offenses are committed by a single individual or by individuals of roughly equal culpability so that none of them will receive an adjustment under § 3B1.1 or § 3B1.2. Where there are multiple participants or individuals, however, some participants in a criminal organization may receive increases under § 3B1.1 (Aggravating Role) while others receive decreases under § 3B1.2 (Mitigating Role) and still other participants may receive no adjustment. Because the guideline ranges are determined based upon the culpability of an average participant in the offense, the court should not presume that a defendant had either an aggravating or mitigating role. As with all chapter three adjustments, the determination of role is made in the context of relevant conduct. Role must, therefore, be determined by assessing a particular defendant's culpability in relation to the acts and omissions within the relevant conduct for which he is accountable. In some cases the relevant conduct will be identical for each defendant, encompassing the same acts and omissions and participants. However, relevant conduct may differ for defendants such that the acts and omissions for which one defendant is accountable will not be the same as those acts and omissions for which another defendant is accountable. Likewise, the number of participants included in the relevant conduct for different defendants may vary.

The proper adjustment for role will therefore assess a defendant's culpability relative to those other participants and individuals within the parameters of his own relevant conduct as opposed to attempting to assess relative culpability of co-defendants in the overall criminal enterprise. Thus, when an offense involves more than one individual, § 3B1.1 or § 3B1.2 (or neither) may apply. In applying this part, § 3B1.1 and § 3B1.2 are to be applied sequentially. Thus, § 3B1.2 is to be considered only if the defendant is not subject to an adjustment under § 3B1.1. If § 3B1.1 applies then § 3B1.2 may not be applied.

To illustrate: Defendants A and B are among 20 co-defendants who are convicted of a drug conspiracy involving 40 participants. Defendant A organized the enterprise which involved the importation of 10 kilograms of drugs on 10 occasions. Defendant B was involved in only one of the importations of 10 kilograms along with four other participants and took orders from Defendant A. The other 9 shipments were beyond the scope of and not

reasonably foreseeable in connection with the one shipment Defendant B agreed to jointly undertake with the other participants. Additionally, Defendant B managed two participants during this importation. Both are convicted of importation of drugs, 21 U.S.C. 952.

Defendant A would be the organizer in the context of his relevant conduct of importation of 100 kilos of drugs involving 40 participants and subject to a four-level increase under § 3B1.1(a) based upon 100 kilos of drugs. Defendant B would be a manager in the context of his relevant conduct of importation of 10 kilos of drugs involving six participants and subject to a three-level increase under § 3B1.1(b), based upon the ten kilos. The relative culpability of Defendant A and Defendant B would be assessed, but such assessment is accomplished separately for each defendant and only in the context of the relevant conduct of the particular defendant under consideration. As both Defendants A and B warranted an increase under § 3B1.1, mitigating role adjustments are not considered for them."

Section 3B1.1(a) is amended by deleting "a criminal activity" and inserting in lieu thereof "an offense".

Section 3B1.1(b) is amended by deleting "criminal activity" and inserting in lieu thereof: "offense".

Section 3B1.1(c) is amended by deleting "criminal activity" and inserting in lieu thereof: "offense".

The Commentary to § 3B1.1 captioned "Application Notes" is amended by deleting Notes 1-3 in their entirety and inserting in lieu thereof:

"1. 'Offense' means the offense of conviction and all relevant conduct attributable to the defendant under Section 1B1.3 of Chapter One.

2. Section 3B1.1 should not be applied to those offenses that have incorporated such an adjustment into the base offense level or specific offense characteristics. These instructions will be noted in the Chapter Two guidelines and Commentary. For example, an adjustment for an aggravating role under this Part is not authorized for a defendant convicted of Continuing Criminal Enterprise, because the offense level for this guideline already reflects an adjustment for role in the offense. See § 2D1.5 and Application Note 1.

3. A participant is a person who takes part in the commission of the offense and is or would be criminally responsible for the commission of the offense, but need not have been convicted or even charged. The defendant is to be considered one of the participants when determining whether there were five participants in the offense.

In a drug trafficking offense, for example, drug users who purchased drugs from the defendant solely for their own personal use would not be considered 'participants' for the

purposes of applying § 3B1.1(a). Similarly, in a case where the defendant was convicted of smuggling aliens into the United States, the aliens would not be considered 'participants' unless they actively assisted in the smuggling of others.

4. Section 3B1.1(a) is also applicable if the criminal activity was 'otherwise extensive,' irrespective of the number of participants. In assessing whether an organization is 'otherwise extensive,' all persons involved in the offense, who can be described as participants and/or unwitting individuals, are to be considered. At least five individuals must be involved in the offense to meet the definition of otherwise extensive. Thus, a fraud that involved only three participants, but used the unknowing services of two or more outsiders could be considered otherwise extensive under § 3B1.1 (a) or (b). If the offense involved less than five other persons, a two-level increase under § 3B1.1(c) may be warranted if the defendant was an organizer, leader, manager or supervisor.

5. In determining the role of the defendant, the following factors although not intended to be exclusive may be considered: An organizer or leader of a criminal activity is one who brings together the participants in charge or in command of others, exercises a very high level of decision making authority, claims a larger share of the fruits of the crime, and exerts the highest degree of control and authority over others. In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as 'kingpin' or 'boss' are not controlling. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy.

6. A manager or supervisor for the purposes of applying § 3B1.1 is one who carries out the orders of a higher authority figure, directs and watches over the work and performance of any other individual, and who exerts less control than that described above for an organizer or leader.

7. In relatively small criminal enterprises involving less than five participants or which are not considered otherwise extensive, the distinction between organization and leadership, and that of management or supervision, is of less significance than in larger enterprises that tend to have clearly delineated divisions of responsibility. This is reflected in the inclusiveness of § 3B1.1(c).

8. This adjustment does not apply to a defendant who merely suggests committing the offense."

The Commentary to Section 3B1.1 captioned "Background" is deleted in its entirety.

Section 3B1.2 is amended by deleting "any criminal activity" wherever it appears and inserting in lieu thereof: "the offense".

The Commentary to section 3B1.2, captioned "Application Notes" is amended by deleting Notes 1-3 in their entirety and inserting in lieu thereof:

"1. The 'offense' is defined in Application Note 1 to § 3B1.1.

2. In order for the defendant to be eligible for a mitigating role under this part he must have been managed, organized, supervised or lead by another participant and must not have exercised any such authority with respect to another person. If the defendant exercised such authority, § 3B1.2 may not be applied. Similarly, if the defendant committed the offense alone or with others of roughly equal culpability no adjustment applies.

3. Not all persons who are managed by others are entitled to a mitigating role adjustment. If the defendant is eligible for the reduction within the meaning of Application Note 2, the court must then determine whether, within the relevant conduct of the particular defendant, that defendant, in fact, had a mitigating role in regard to the offense.

4. In determining the role in the offense of the defendant, the following factors, although not intended to be exclusive, may be considered: whether the defendant received substantially less of the profits or fruits of the crime than other participants, whether the defendant performed a peripheral function in the commission of the offense (such as a lookout, driver, offloader), whether he has engaged in the criminal conduct on only one occasion.

5. Role adjustments under § 3B1.2 should not be applied to those offenses that have incorporated such adjustment into the base offense level or specific offense characteristics. These instructions will be noted in the chapter two guidelines and Commentary. For example, an adjustment for mitigating role under this part normally would not apply to a defendant convicted of Accessory After the Fact, because the offense level for this guideline already reflects an adjustment for role in the offense. See § 2X3.1 and Application Note 2.

6. For purposes of § 3B1.2(b) a minor participant means any participant who is less culpable than most other participants in the offense, but whose role could not be described as minimal. For example, if a defendant was a one-time offloader of one shipment of marijuana (or is a one-time courier, or one-time lookout) and received a small portion of the value of the contraband and meets the qualifications of Application Note 2 above, he could be considered a minimal participant. However, if the same defendant performed the same tasks on two or more occasions he would not be considered a minimal participant. In such case, he could get no more than the two-level reduction for minor role."

The Commentary to Section 3B1.2 captioned "Background" is deleted in its entirety.

Section 3B1.4, including accompanying Commentary, is deleted in its entirety.

**Reason for Amendment:** The amendment clarifies the application and scope of adjustments for a defendant's role in the offense under §§ 3B1.1 and 3B1.2. Section 3B1.4 is eliminated as unnecessary.

51. § 3B1.3 (Abuse of Trust). The Commission requests comment

concerning whether this section should be amended to provide that an increase in the offense level under this section should be in addition to, and irrespective of, the application of § 3B1.1. In addition, comment is requested as to whether this guideline or commentary should be amended to more clearly specify the types of conduct to which this adjustment is intended to apply.

### CHAPTER THREE, PART C (OBSTRUCTION)

52. Proposed Amendment: Section 3C1.1 is amended in the title by deleting "Willfully Obstructing or Impeding Proceedings" and inserting in lieu thereof "Obstructing or Impeding the Investigation, Prosecution, or Sentencing of the Instant Offense".

Section 3C1.1 is amended by deleting "impeded or obstructed, or attempted to impede or obstruct" and inserting in lieu thereof "obstructed or impeded, or attempted to obstruct or impede", by deleting "or prosecution" and inserting in lieu thereof ", prosecution, or sentencing", and by deleting "during" and inserting in lieu thereof "in respect to".

**Reason for Amendment:** The proposed amendment substitutes a title more descriptive of the coverage of the section. In addition, the amendment expressly provides that obstructing or impeding the sentencing of the instant offense is covered, inserts a missing comma, and conforms the phraseology of the guideline to the title by reversing the order of impeding and obstructing. In addition, the current guideline and first paragraph of Commentary use different terminology: the guideline uses "during"; the Commentary uses "in respect to". The proposed amendment substitutes "in respect to" for "during" in the guideline as the more appropriate phraseology.

53. Obstructing or Impeding the Investigation, Prosecution, or Sentencing of the Instant Offense. The Commission notes that obstructive conduct can vary widely in nature, degree of planning, and seriousness, and that the current guideline has led to differing interpretations as to the specific types of conduct, that, absent a separate count of conviction, are sufficiently serious to warrant a 2-level enhancement under this section. The Commission solicits comment on whether application note 1 should be amended to provide additional examples of what conduct should be counted, and whether this note should be expanded to include examples of what conduct should not

result in an enhancement under this section.

The following is a listing of various forms of conduct that, absent a separate count of conviction, may or may not warrant a 2-level enhancement under this section. Comment is requested whether the conduct in each of these examples should or should not result in a 2-level enhancement under this section. Bracketed language indicates that an example might be formulated in more than one way or interacts with another example. Recommendations as to how the examples set forth below could be improved, or as to additional examples, are also requested:

- (1) Threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;
- (2) Testifying untruthfully as to a material fact, or suborning or attempting to suborn untruthful testimony, as to a material fact;
- (3) Producing a false, altered, or counterfeit document or record during an investigation or judicial proceeding, or attempting to do so;
- (4) Destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an investigation or judicial proceeding (e.g. shredding a document or destroying a ledger upon learning that an investigation has commenced or is about to commence), or attempting to do so;
- (5) [Attempting to conceal, throw away, or otherwise dispose of evidence contemporaneously with arrest (e.g. attempting to throw away a weapon or controlled substance)], except where such conduct results in a material hindrance to the investigation or prosecution of the offense];
- (6) Escaping from custody before trial or sentencing, or attempting to do so; or willfully failing to appear, as ordered, for a judicial proceeding;
- (7) Providing a fraudulent identification document at arrest;
- (8) [Providing a false name at arrest] [not accompanied by a fraudulent identification document].
- (9) Providing a materially false written, signed statement to a law enforcement officer;
- (10) Providing materially false information to a law enforcement officer that significantly obstructs or impedes the investigation of the offense (e.g., a defendant upon questioning admits guilt in a credit card scheme, but provides false detailed information that diverts law enforcement officers from apprehending co-conspirators who are

thereby able to continue the operation of the scheme and flee the country).

(11) [Making false oral exculpatory statements, not under oath, to law enforcement officers] [, other than described above].

(12) Providing materially false information to a judge or magistrate (including false information as to the defendant's identity);

(13) Providing materially false information to a probation or pretrial officer in respect to a presentence or other investigation for the court (e.g., providing false information concerning prior criminal history; concealing assets to avoid paying restitution or a fine).

(14) Providing misleading or incomplete information, not amounting to a material falsehood, in respect to a pretrial or presentence investigation.

(15) Recklessly endangering the safety of another in fleeing from arrest.

(16) [Avoiding or fleeing from arrest] [other than as described above].

Comment is also requested on the addition of a separate guideline (§ 3C1.2) providing a 2-level enhancement for reckless endangerment during flight from arrest (i.e., where the defendant recklessly created a substantial risk of bodily injury to another person in the course of flight from arrest or questioning in connection with instant offense).

### CHAPTER THREE, PART D (MULTIPLE COUNTS)

54. Proposed Amendment: Section 3D1.1 is amended by inserting "(a)" immediately before "When"; by deleting "(a)", "(b)", and "(c)", and inserting in lieu thereof "(1)", "(2)", and "(3)" respectively; and by inserting the following additional subsection:

"(b) Any count for which the statute mandates imposition of a consecutive sentence is excluded from the operation of §§ 3D1.2-3D1.5. Sentences for such counts are governed by the provisions of § 5G1.2(a)."

The Commentary to § 3D1.1 captioned "Application Notes" is amended in Note 3 by deleting:

"Certain offenses, e.g., 18 U.S.C. 924(c) (use of a deadly or dangerous weapon in relation to a crime of violence or drug trafficking) by law carry mandatory consecutive sentences. Such offenses are exempted from the operation of these rules. See § 3D1.2.", and inserting in lieu thereof:

"Counts for which a statute mandates imposition of a consecutive sentence are excepted from application of the multiple count rules. Conviction on such counts are not used in the determination of a combined offense level under this Part, but may affect the offense level for other counts. A

conviction for 18 U.S.C. 924(c) (use of firearm in commission of a crime of violence) provides a common example. In the case of a conviction under 18 U.S.C. 924(c), the specific offense characteristic for weapon use in the primary offense is to be disregarded to avoid double counting. See Commentary to § 2K2.4. Example: The defendant is convicted of one count of bank robbery (18 U.S.C. 2113), and one count of use of a firearm in the commission of a crime of violence (18 U.S.C. 924(c)). The two counts are not grouped together, and the offense level for the bank robbery count is computed without application of an enhancement for weapon possession or use. The mandatory five-year sentence on the weapon-use count runs consecutively, as required by law. See § 5G1.2(a)."

Section 3D1.2 is amended by deleting: "A count for which the statute mandates imposition of a consecutive sentence is excluded from such Groups for purposes of §§ 3D1.2-3D1.5."

The Commentary to § 3D1.2 captioned "Application Notes" is amended by deleting Note 1 in its entirety.

**Reason for Amendment:** The provisions concerning consecutive sentences that are statutorily required most appropriately belong in the first section of this Part § 3D1.1. In the current guidelines, this provision is contained in a paragraph in § 3D1.2, and is cross referenced by Application Note 1 of § 3D1.1. In addition, Application Note 1 to § 3D1.2 further explains this provision. This amendment moves the provisions dealing with statutorily required consecutive sentences to a separate subsection of § 3D1.1 where they more appropriately belong.

**55. Proposed Amendment:** Section 3D1.2(b) is amended by deleting:

"including, but not limited to:

(1) A count charging conspiracy or solicitation and a count charging any substantive offense that was the sole object of the conspiracy or solicitation. 28 U.S.C. 994(1)(2).

(2) A count charging an attempt to commit an offense and a count charging the commission of the offense. 18 U.S.C. 3584(a).

(3) A count charging an offense based on a general prohibition and a count charging violation of a specific prohibition encompassed in the general prohibition. 28 U.S.C. 994(v)".

Section 3D1.2(d) is amended by deleting "Counts are grouped together if" and inserting in lieu thereof "When".

Section 3D1.2(d) is amended by deleting "specifically included" and inserting in lieu thereof "grouped".

The Commentary to § 3D1.2 captioned "Application Notes" is amended by inserting the following as Note 1:

"1. Subsections (a)-(d) set forth circumstances in which counts are to be

grouped together into a single Group. Counts are to be grouped together into a single Group if any one or more of the subsections provide for such grouping. Counts for which the statute mandates imposition of a consecutive sentence are excepted from application of the multiple count rules. See § 3D1.1(b)."

The Commentary to § 3D1.2 captioned "Application Notes" is amended in the first sentence of Note 4 by deleting "states the principle" and inserting in lieu thereof "provides".

The Commentary to § 3D1.2 captioned "Application Notes" is amended in Note 3 by inserting the following as the second paragraph:

"When one count charges an attempt to commit an offense and the other charges the commission of that offense, or when one count charges an offense based on a general prohibition and the other charges violation of a specific prohibition encompassed in the general prohibition, the counts will be grouped together under subsection (a)."

The Commentary to § 3D1.2 captioned "Application Notes" is amended in Note 4 by inserting the following as the second sentence:

"This provision does not authorize the grouping of offenses that cannot be considered to represent essentially one composite harm (e.g., robbery of the same victim on different occasions involves multiple, separate instances of fear and risk of harm, not one composite harm)."

The Commentary to § 3D1.2 captioned "Application Notes" is amended in Note 4 by inserting the following as the second paragraph:

"When one count charges a conspiracy or solicitation and the other charges a substantive offense that was the sole object of the conspiracy or solicitation, the counts will be grouped together under subsection (b)."

**Reason for Amendment:** Because this Part is inherently complex, it is especially important that each provision be as clear as possible. Inclusion of the examples in (b) (1), (2), and (3) tend to confuse the reader because these are not the most typical examples of the rule. Also, these examples are inaccurate as part of the conduct covered (a count charging an attempt to commit an offense and a count charging the commission of that offense; a count charging a violation of a general prohibition and a count charging violation of a specific prohibition encompassed in the general prohibition) should actually be grouped under § 3D1.2(a), not § 3D1.2(b). In addition, this amendment makes editorial improvements in § 3D1.2(d), and clarifies the Commentary of § 3D1.2 by making explicit that offenses such as

multiple robberies do not fit within the parameters of § 3D1.2(b).

**56. Proposed Amendment:** Section 3D1.2(d) is amended in the second paragraph by inserting in the appropriate place: "§ 2K2.2".

Section 3D1.2(d) is amended in the third paragraph by inserting "Chapter Two," immediately before "Part A".

**Reason for Amendment:** This amendment makes the listing of offenses more comprehensive and corrects a clerical error.

**57. Proposed Amendment:** Section 3D1.4 is amended in the fourth line of the Unit table by inserting "2½—" immediately before "3" the first time it appears, and in the fifth line of the Unit table by deleting "4 or" and inserting in lieu thereof "3½—".

Section 3D1.4 is amended by deleting: "(d) Except when the total number of Units is ½, round up to the next large whole number."

The Commentary to § 3D1.4 captioned "Background" is amended in the first paragraph by deleting "When this approach produces a fraction in the total Units, other than ½, it is rounded up to the nearest whole number."

**Conforming Amendment:** The "Illustrations of the Operation of the Multiple-Count Rules" following § 3D1.5 is amended in example 1 by deleting "(rounded up to 3)", and by deleting "18" and "4—" and inserting in lieu thereof "20" and "2—" respectively.

**Reason for Amendment:** Because the Multiple Count rules are inherently complex, any unnecessary complexity is particularly to be avoided. This amendment simplifies the operation of this guideline. The amendment also conforms that illustrations of the operation of the multiple-count rules and corrects a clerical error.

#### CHAPTER THREE PART E (ACCEPTANCE OF RESPONSIBILITY)

**58. Acceptance of Responsibility.** The Commission requests comment concerning a number of aspects of this guideline. First, comment is requested as to whether this guideline should be amended to expressly provide that a reduction for acceptance of responsibility is not warranted when the defendant first evidences such acceptance after adjudication of guilt. Second, comment is requested as to whether the Commission should more clearly indicate the weight that should be given to the entry of a guilty plea in determining acceptance of responsibility and, if so, the appropriate weight to be given, and whether the timing of the plea should affect this weight. Third, the

Commission requests comment on whether this guideline should be reformulated to give varying weights to different indicia of acceptance of responsibility, and, if so, how this might be accomplished.

#### CHAPTER FOUR, PART A (CRIMINAL HISTORY)

**59. Proposed Amendment:** The Commentary to § 4A1.2 captioned "Application Notes" is amended in Note 6 by deleting the fourth sentence as follows:

"Also, if to count an uncounseled misdemeanor conviction would result in the imposition of a sentence of imprisonment under circumstances that would violate the United States Constitution, then such conviction shall not be counted in the criminal history score."

The Commentary to § 4A1.2 captioned "Application Notes" is amended in Note 6 by inserting the following immediately before the period at the end of the second sentence:

", including a sentence resulting from a constitutionally valid, uncounseled (felony or misdemeanor) conviction".

The Commentary to § 4A1.2 is amended by inserting at the end:

*Background.* Except as expressly provided, all sentences resulting from constitutionally valid convictions (including misdemeanor convictions where imprisonment was not imposed and, thus, provision of counsel was not constitutionally required) are counted. To exclude prior sentences resulting from constitutionally valid convictions on the basis of whether the convictions were counseled or uncounseled would create wide disparity (e.g., some jurisdictions routinely provide counsel in all misdemeanor cases; others do not). To avoid such disparity by prohibiting use of all misdemeanor convictions not resulting in imprisonment would deprive the court of significant information relevant to the purposes of sentencing. Therefore, the Commission's criterion for inclusion of a prior sentence in the criminal history score is whether the prior sentence resulted from a constitutionally valid conviction, not whether the conviction was counseled or uncounseled. The Commission does not believe the inclusion of sentences resulting from constitutionally valid, uncounseled misdemeanor convictions in the criminal history score is foreclosed by *Baldasar v. Illinois*, 446 U.S. 222 (1980).

The Commentary to § 4A1.2(d) captioned "Application Notes" is amended in the second sentence of Note 6 by deleting "in a" and inserting in lieu thereof "from a".

**Reason for Amendment:** There appears to be confusion as to the Commission's instructions regarding the counting of sentences resulting from constitutionally valid, although

uncounseled, misdemeanor convictions under Chapter Four, Part A. This confusion seems to have been created by the Commission's failure to make clear its instruction on the counting of constitutionally valid, uncounseled misdemeanor convictions. This confusion may result in considerable disparity in guideline application, and the failure of the criminal history score to adequately reflect the defendant's failure to learn from the application of previous sanctions and potential for recidivism. This amendment expressly states the Commission's position that such convictions are to be counted for the purposes of criminal history under Chapter Four, Part A.

**60. Proposed Amendment:** Section 4A1.2(a)(3) is amended by inserting "or execution" immediately following "imposition".

**Reason for Amendment:** This amendment clarifies that, for the purpose of computing criminal history points, there is no difference between the suspension of the "imposition" and "execution" of a prior sentence.

**61. Proposed Amendment:** Section 4A1.2(c)(1) is amended by inserting "Careless or reckless driving" in the list of offenses contained therein in the appropriate place by alphabetical order.

Section 4A1.2(c)(1) is amended by inserting in the appropriate place by alphabetical order:

"Insufficient funds check".

Section 4A1.2(c)(1) is amended by inserting "(excluding local ordinance violations that are also criminal offenses under state law)" immediately following "Local ordinance violations".

Section 4A1.2(c)(2) is amended by inserting "(e.g., speeding)" immediately following "minor traffic infractions".

The Commentary to § 4A1.2 captioned "Application Notes" is amended by inserting the following additional note:

"12. Local ordinance violations. A number of local jurisdictions have enacted ordinances covering certain offenses (e.g., larceny and assault misdemeanors) that are also violations of state criminal law. This enables a local court (e.g., a municipal court) to exercise jurisdiction over such offenses. Such offenses are excluded from the definition of local ordinance violations in § 4A1.1(c) and, therefore, sentences for such offenses are to be treated as if the defendant had been convicted under state law."

The Commentary to § 4A1.2 captioned "Application Notes" is amended by inserting the following additional note:

"13. 'Insufficient funds check,' as used in § 4A1.2(c)(1), does not include any conviction establishing that the defendant used a false name or non-existent account."

**Reason for Amendment:** This amendment makes the provisions of § 4A1.2(c) more comprehensive in respect to certain vehicular offenses, and clarifies the application of § 4A1.2(c)(1) in respect to certain offenses prosecuted in municipal courts. In addition, this amendment expands the coverage of § 4A1.2(c)(1) to include a misdemeanor or petty offense conviction for an insufficient funds check.

**62. Vacated, Set Aside, Expunged, and Pardoned Convictions.** A number of jurisdictions have various procedures pursuant to which a defendant's conviction may be vacated, "set aside," or "expunged," or the defendant may be pardoned, for reasons unrelated to innocence or legal defect (e.g., in order to restore civil rights or to remove the stigma associated with a criminal conviction). Currently, the guidelines authorize the counting of criminal history points for prior convictions that have been vacated, "set aside," or for which the defendant has been pardoned, where such action was for reasons unrelated to innocence or legal defect. However, convictions which have been expunged are not counted in the criminal history score but may be considered under § 4A1.3 (Adequacy of Criminal History).

The Commission notes that Rule 609 of the Rules of Evidence authorizes the admission of an adult prior conviction that has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based upon a finding of the rehabilitation of the person convicted if the defendant has been subsequently convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year. In the context of use of a conviction in the criminal history score, each defendant will have been convicted of a subsequent offense (the instant offense).

The Commission seeks comment on whether the Commission should retain the current treatment of expunged convictions, or whether the Commission should treat expunged convictions (other than for reasons of innocence or legal defect) the same as "set aside" or pardoned convictions; and if so on whether such convictions should or should not be counted in determining prior criminal history.

One amendment proposal under consideration would authorize the use of prior expunged adult convictions in counting criminal history points. Expunged juvenile adjudications would not be counted in accord with the distinction currently made at § 4A1.2(j). This proposal is as follows:

Section 4A1.2(j) is deleted in its entirety as follows:

**"(j) Expunged Convictions**

Sentences for expunged convictions are not counted, but may be considered under § 4A1.3 (Adequacy of Criminal History Category).",

and the following inserted in lieu thereof:

**"(j) Reversed, Vacated, Pardoned, or Expunged Convictions**

(1) Sentences resulting from convictions that have been reversed are not counted. Sentences resulting from convictions that have been vacated, 'set aside,' or expunged, or for which the defendant has been pardoned, are not counted if such action was based on a determination that the conviction was legally defective or on evidence exonerating the defendant.

(2) A number of jurisdictions have various procedures pursuant to which the defendant's conviction may be vacated, 'set aside,' or expunged, or the defendant may be pardoned, for reasons unrelated to innocence or legal defect (e.g., in order to restore civil rights or to remove the stigma associated with a criminal conviction). Sentences for such convictions are counted. Provided, however, that a sentence resulting from a juvenile adjudication for an offense committed prior to the defendant's eighteenth birthday that has been vacated, 'set aside,' or expunged is not counted."

The Commentary to § 4A1.2 captioned "Application Notes" is amended in the first sentence of Note 6 by deleting:

"Sentences resulting from convictions that have been reversed or vacated because of errors of law, or because of subsequently-discovered evidence exonerating the defendant, are not to be counted. Any other sentence resulting in",

and inserting in lieu thereof:

"Except as expressly provided, a sentence resulting from".

The Commentary to § 4A1.2 captioned "Application Notes" is amended by deleting Note 10 in its entirety and renumbering Note 11 as Note 10.

**63. § 4A1.2—Definitions and Instructions for Computing Criminal History.** The Commission has received feedback from probation officers and others that certain definitions in this section are difficult to apply in certain cases. The definition of related offenses in Application Note 3, and the treatment of a revocation of probation where the defendant is under supervision for multiple unrelated offenses in Application Note 11, have been reported to be particularly difficult to apply. Some have expressed the view that the

definition of related offenses in Application Note 3 is too inclusive (e.g., where otherwise unrelated federal cases are consolidated under Rule 20) and that distinctions should be made for different types of offenses (e.g., that previous offenses should be treated as related or unrelated by applying rules similar to those in Chapter Three, Part D (Multiple Counts)). The Commission seeks comment on how any of the definitions and instructions of this section might be improved. The Commission also seeks comment on whether § 4B1.2 (Definitions of Terms Used in § 4B1.1) should be amended to provide a separate set of instructions for counting prior crimes of violence or controlled substance offenses under this section to allow the counting of such convictions unrestricted by the applicable time periods of § 4A1.2.

In addition, comment is requested on whether the Commission should develop a specific guideline enhancement for prior similar criminal conduct in lieu of the current provision for consideration of this factor under § 4A1.3 (Adequacy of Criminal History Category).

#### Chapter Five, Part A (Sentencing Table)

64. Proposed Amendment: Chapter Five, Part A, is amended in the Sentencing Table by deleting "(13 or more)" and inserting in lieu thereof "(13-15)", and by inserting the following additional column:

#### "VII

Offense level	(16 or more)
1	2-8
2	4-10
3	6-12
4	9-15
5	12-18
6	15-21
7	18-24
8	21-27
9	24-30
10	27-33
11	30-37
12	33-41
13	37-46
14	41-51
15	46-57
16	51-63
17	57-71
18	63-78
19	70-87
20	77-96
21	84-105
22	92-115
23	100-125
24	110-137
25	120-150
26	130-162
27	140-175
28	151-188
29	168-210
30	188-235
31	210-262
32	235-293

Offense level	(16 or more)
33	262-327
34	292-365
35	324-405
36	360-life
37	360-life
38	360-life
39	360-life
40	360-life
41	360-life
42	360-life
43	360-life".

**Reason for Amendment:** This amendment would create an additional criminal history category to address cases that have criminal history score substantially above 13 points. Although the proportion of cases is small (approximately 3%) the Commission believes that an additional category for cases having such extensive criminal records is warranted to adequately punish and incapacitate such offenders.

**Conforming Amendments:** Section 4A1.3 is amended in the fourth paragraph by deleting "Category VI" and inserting in lieu thereof "Category VII".

The proposed amendment would also require a conforming amendment to the career offender provision in Chapter Four, Part B. Comment is requested as to the two options shown below:

**Option 1:** Section 4B1.1 is amended by deleting "Category VI" and inserting in lieu thereof "the category corresponding to the defendant's criminal history points, or Category VI, whichever is greater". This would ensure that a defendant with criminal history points sufficient for placement in new Category VII would not receive a benefit from this revision. That is, this option would increase the guideline range for all career offenders with Category VII criminal histories but would otherwise not affect the guideline ranges for such cases. Under this option, the guideline range for a non-career offender with a Category VII criminal history could be higher than that for a career offender with a Category VII criminal history (but this would happen only where the offense level for a career offender determined from Chapters Two and Three was greater than the offense level from the chart in § 4B1.1).

**Option 2:** Section 4B1.1 is amended by substituting "Category VII" for Category VI" and by conforming the offense levels in § 4B1.1 (which are geared to the statutory maxima) by reducing each offense level by 1 level (e.g., level 37 would become level 36, thereby producing the same guideline range). This option would automatically

increase the guideline ranges for all career offenders where the offense level was determined by the offense level for the underlying offense rather than the chart in § 4B1.1 whether or not the defendant's criminal history points were sufficient for placement in new Category VII, but would retain the current guideline range where the offense level is determined from the chart in § 4B1.1.

#### CHAPTER FIVE, PART E (RESTITUTION, FINES, ASSESSMENTS, FORFEITURES)

**65. Proposed Amendment:** Section 5E1.1(a) is amended by deleting " ", and may be ordered as a condition of probation or supervised release in any other case", by redesignating subsections (b) and (c) as (c) and (d) respectively, and by inserting the following as subsection (b):

"(b) In the case of a conviction not covered under subsection (a), the court shall provide for restitution by imposing a term of probation or supervised release with a condition requiring restitution, unless the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of a restitution requirement outweighs the need to provide restitution to any victims.".

The Commentary to § 5E1.1 captioned "Background" is amended in the first paragraph by deleting "An order of restitution may be appropriate in offenses not specifically referenced in 18 U.S.C. 3663 where victims require relief more promptly than the civil justice system provides.".

The Commentary to § 5E1.1 captioned "Background" is amended in the second paragraph by deleting "Subsection 5E1.1" and inserting in lieu thereof "Section 5E1.1(a)".

The Commentary to § 5E1.1 captioned "Background" is amended in the last paragraph by deleting "how and to whom" and by inserting "the manner and the persons to whom".

The Commentary to § 5E1.1 captioned "Background" is amended by inserting the following additional paragraph at the end:

"Section 5E1.1(b) requires restitution for offenses not covered under 18 U.S.C. 3663(a) as a condition of probation or supervised release.".

**Reason for Amendment:** This amendment expands restitution as a guideline remedy for convictions other than those under Title 18 and 49 U.S.C. 1472(b), (ii), (j), and (h). Section 3663(d) of Title 18 provides for restitution for convictions under Title 18 and 49 U.S.C. 1472(b), (ii), (j), or (h). The present guideline permits restitution as a

condition of probation or supervised release in other cases not covered by 18 U.S.C. 3663(d), but does not require restitution in such cases. This amendment requires that restitution be ordered as a condition of probation or supervised release for offenses not covered by 18 U.S.C. 3558, provided that the same standards are met, i.e., unless the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution outweighs the need to provide restitution to any victims.

**66. Proposed Amendment:** Section 5E1.2 is amended by deleting subsections (a) through (c) of § 5E1.2 in their entirety and inserting in lieu thereof:

"(a) The court shall impose a fine in each case except as provided by subsection (b) below.

(b) If the defendant establishes that (1) he is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay all or part of the fine required by subsections (c) and (h) below, or (2) the imposition of such fine would unduly burden the defendant's dependents, the court may impose a lesser fine or waive the fine. [In these circumstances, the court shall consider alternative sanctions in lieu of all or a portion of the fine, and must still impose a total combined sanction that is punitive. Although any additional sanction not proscribed by the guidelines is permissible, community service is the generally preferable alternative in such instances.]

(c)(1) The minimum of the guideline fine range is:

(A) The amount shown in Column A of the table in subdivision (3) below; plus

(B) Any pecuniary gain to the defendant from the offense that has not been disgorged (by reparation, restitution, forfeiture, or otherwise) and that otherwise will not be ordered disgorged.

(2) The maximum of the guideline fine range is:

(A) The greater of:

(i) The amount from column B or C of the table in subdivision (3) below. Column C shall be used where the statute setting forth the offense of conviction authorizes (i) a fine of more than \$250,000 on a single count of conviction; or (ii) a fine for each day of violation. Column B shall be used in all other cases;

(ii) Twice the gross pecuniary loss caused by the offense or specifically intended; or

(iii) Twice the gross pecuniary gain to [the defendant] [all participants in the offense] from the offense; plus

(B) Any pecuniary gain to the defendant from the offense that has not been disgorged (by reparation, restitution, forfeiture, or otherwise) and that otherwise will not be ordered disgorged.

(3) Table:

Offense level	A	B	C
	Min- imum	Maxi- mum	Maximum- specified offenses
3 and below .....	\$100	\$5,000	\$5,000
4-5 .....	250	5,000	7,500
6-7 .....	500	5,000	10,000
8-9 .....	1,000	10,000	20,000
10-11 .....	2,000	20,000	40,000
12-13 .....	3,000	30,000	90,000
14-15 .....	4,000	40,000	160,000
16-17 .....	5,000	50,000	250,000
18-19 .....	6,000	60,000	360,000
20-22 .....	7,500	75,000	550,000
23-25 .....	10,000	100,000	1,000,000
26-28 .....	12,500	125,000	1,500,000
29-31 .....	15,000	150,000	2,250,000
32-34 .....	17,500	175,000	3,000,000
35-37 .....	20,000	200,000	5,000,000
38 and above .....	25,000	250,000	8,000,000

#### (4) Special Instruction:

Where the guideline for the offense in Chapter Two provides a specific rule for imposing a fine, that rule takes precedence over subdivisions (1)-(3) of this subsection."

Subsection 5E1.2(e) is amended by inserting "(Policy Statement)" immediately after "e" and by inserting "Where the defendant has derived pecuniary gain from the offense that has not been disgorged (by reparation, restitution, forfeiture, or otherwise) and otherwise will not be ordered disgorged, the amount of the fine should not be less than any such gain plus the minimum from the table in subsection (c)(3) herein." at the end.

Section 5E1.2 is amended by deleting subsection (f) in its entirety and relettering subsections (g), (h), and (i) as (f), (g), and (h) respectively.

Section 5E1.2 is amended in relettered subsection (f) in the third sentence by inserting "normally" after "defendant" and in the last sentence by inserting "or restricting" after "prohibiting".

Section 5E1.2 is amended in relettered subsection (h) by deleting "(f)" and inserting "(b)" in lieu thereof.

The Commentary to § 5E1.2 captioned "Application Notes" is amended by deleting Note 2 in its entirety and inserting in lieu thereof:

"2. Subsection (c)(1) provides that the minimum of the fine range includes any

pecuniary gain to the defendant from the offense that has not been disgorged (e.g., by reparation, restitution, or forfeiture) or that otherwise will not be ordered disgorged. When it is readily ascertainable that the defendant would not have the ability to pay a fine greater than the minimum from column A of the table in subsection (c)(3), calculation of pecuniary gain is unnecessary. In such cases, a statement that 'the pecuniary gain was not calculated because it is readily ascertainable that the defendant would not have the ability to pay a fine greater than the minimum provided in the fine table,' in lieu such calculations, is recommended."

The Commentary to § 5E1.2 captioned "Application Notes" is amended by deleting Note 3 in its entirety and inserting in lieu thereof:

"3. Subsection (c)(2) provides that the maximum of the fine guideline range is the greatest of the three alternatives set forth in subdivisions (c)(2)(A), (c)(2)(B), and (c)(2)(C). Where it is readily ascertainable that the defendant would not have the ability to pay a fine greater than the maximum from Column B or C, as applicable, of the table in subsection (c)(3), calculation of the alternatives in subsections (c)(2)(B) and (c)(2)(C) is unnecessary. In such cases, a statement that 'the alternative maximums to the fine table were not calculated because it is readily ascertainable that the defendant would not have the ability to pay a fine greater than the maximum provided in the fine table,' in lieu of such calculations, is recommended."

The Commentary to § 5E1.2 captioned "Application Notes" is amended by deleting Note 4 in its entirety and inserting in lieu thereof:

"4. Subsections [s] (c)(1)(B) and] (c)(2)(B) [are] [is] designed to increase the [minimum and the] maximum of the fine guideline range by any gain derived by the defendant from the offense that has not been disgorged and otherwise would not be ordered disgorged. This provision would not be applicable in a typical theft offense, for example, because the defendant's gain would normally be disgorged by law enforcement seizure of the stolen property, by voluntary restitution prior to sentencing, or by an order of restitution. This provision might apply, for example, in an offense involving the transportation of unlawful aliens because the defendant's pecuniary gain would not be subject to a restitution order."

The Commentary to § 5E1.2 captioned "Application Notes" is amended in numbered Note 5 by deleting "Subsection" and inserting in lieu thereof "Column C of the fine table in subsection" and by deleting "; the guidelines do not limit maximum fines in such cases".

The Commentary to § 5E1.2 captioned "Application Notes" is amended by renumbering Application Note 7 as Application Note 9, and by adding new Notes 7 and 8:

"7. 'Gross pecuniary loss,' for the purposes of this guideline, has the same meaning as 'loss,' as used in Chapter Two (Offense Conduct). See the Commentary to § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). In the case of an attempt, conspiracy, or solicitation, loss is to be determined in accordance with the provisions of § 2X1.1 (Attempt, Solicitation, or Conspiracy).

8. 'Gross pecuniary gain [to the defendant],' for the purposes of this guideline, means the additional before-tax profit to [the defendant] [all participants in the offense] resulting from the relevant offense conduct. [Use the gross pecuniary gain to all participants in lieu of the gross pecuniary gain to the defendant if the gain has not been divided or if the manner of the division is unknown]."

The Commentary to § 5E1.2 captioned "Background" is amended by deleting the first paragraph in its entirety and inserting in lieu thereof:

"In general, the maximum fine permitted by law as to each count of conviction is \$250,000 for a felony or for any misdemeanor resulting in death; \$100,000 for a Class A misdemeanor; and \$5,000 for any other offense. 18 U.S.C. 3571(b) (3)-(7). However, higher or lower limits may apply when specified by statute. 18 U.S.C. 3571(b)(1), (e). As an alternative maximum, the court may fine the defendant up to the greater of twice the gross gain or twice the gross loss. 18 U.S.C. 3571(b)(2), (d)."

The Commentary to § 5E1.2 captioned "Background" is amended by deleting the third and fourth paragraphs.

The Commentary to § 5E1.2 captioned "Background" is amended in the second paragraph by deleting "Recent legislation provides for substantial increases in fines." and inserting in lieu thereof "Legislation enacted in 1984 substantially increased maximum authorized fines."

**Reason for Amendment:** The purposes of this amendment are to provide guidance to courts in setting fines when the defendant is convicted under a statute authoring a maximum fine greater than \$250,000 a fine for each day of violation, to clarify the meaning of "gross pecuniary loss" and "gross pecuniary gain", to clarify and simplify the setting of fines when the defendant is unable to pay all or part of fine that could otherwise be imposed, and to clarify and rationalize the relationships between pecuniary gain, pecuniary loss, and the minimum and maximum of the guideline fine range.

The Commission is considering deleting the bracketed language in subsection (c)(1). If that language is deleted, the Commission proposes to add the second sentence of subsection (e); otherwise, the second sentence of subsection (e) will be deleted. The Commission requests comment on these options.

The Commission is considering alternative language in subsection (c)(2)(A)(iii) and in renumbered Application Note 8. If the second alternative is selected, the Commission proposes to use the bracketed sentence in renumbered Application Note 8; otherwise, the bracketed sentence will be deleted. The Commission requests comment on these options.

## CHAPTER FIVE, PART H

67. Proposed Amendment: The Introductory Commentary to Chapter Five, Part H is deleted in its entirety and the following inserted in lieu thereof:

"The following policy statements address the relevance of certain offender characteristics to the determination of whether a sentence should be outside the applicable guideline range, and in certain cases to the determination of a sentence within the applicable guideline range.

The Commission has determined that certain factors are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range. Unless expressly stated, this does not mean that the Commission views such factors as necessarily inappropriate to the determination of the sentence within the applicable guideline range or to the determination of various other incidents of an appropriate sentence (e.g., the appropriate conditions of probation or supervised release).

In addition, 28 U.S.C. 994(e) requires the Commission to assure that its guidelines and policy statements reflect the general inappropriateness of considering the defendant's education, vocational skills, employment record, family ties and responsibilities, and community ties in determining whether a term of imprisonment should be imposed or the length of a term of imprisonment."

Section 5H1.1 is amended by inserting "(including youth)" immediately following "Age", and by deleting "guidelines. Neither is it ordinarily" and all that follows through the end of the section and inserting in lieu thereof "applicable guideline range. Physical condition, which may be related to age, is addressed at § 5H1.4 (Physical Condition). The guidelines are not applicable to persons sentenced as juvenile delinquents under the provisions of 18 U.S.C. 5037".

Section 5H1.2 is amended in the first sentence by deleting "guidelines" and inserting in lieu thereof "applicable guideline range"; and by deleting "Neither are education and vocational

skills" and all that follows through the end of the section, and inserting the following as additional paragraphs:

"In addition, education and vocational skills are not ordinarily relevant in determining whether a term of imprisonment should be imposed or the length of any term of imprisonment within the applicable guideline range (28 U.S.C. 994(e)).

Education and vocational skills may be relevant in determining the conditions of probation or supervised release for rehabilitative purposes, for public protection by restricting activities that allow for the utilization of a certain skill, or in determining the type of community service appropriate."

Section 5H1.3 is amended in the first sentence by deleting "guidelines" and inserting in lieu thereof "applicable guideline range", and by deleting "the general provisions in Chapter Five." and all that follows through the end of the section, and inserting in lieu thereof:

#### "Chapter Five, Subpart 2 (General Provisions).

Mental and emotional conditions may be relevant in determining the conditions of probation or supervised release (e.g., participation in a mental health program, see recommended condition (24) at § 5B1.4 (Recommended Conditions of Probation and Supervised Release))."

Section 5H1.4 is amended by deleting "guidelines or where within the guidelines a sentence should fall" and inserting in lieu thereof "applicable guideline range", by deleting "other than imprisonment" and inserting in lieu thereof "below the applicable guideline range; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment", by deleting ". If participation in a substance abuse program" and all that follows through the end of the paragraph and inserting in lieu thereof "(see recommended condition (23) at § 5B1.4 (Recommended Conditions of Probation and Supervised Release)). Similarly, where a defendant who is a substance abuser is sentenced to probation, it is highly recommended that such probation contains a requirement that the defendant participate in an appropriate substance abuse program (see recommended condition (23) at § 5B1.4 (Recommended Conditions of Probation and Supervised Release)).", and by deleting the last paragraph.

Section 5H1.4 is amended in the caption by deleting "Dependence and" immediately following "Drug" and inserting in lieu thereof "or", and by

inserting "Dependence or" immediately following "Alcohol".

Section 5H1.4 is amended in the first sentence of the second paragraph by deleting "dependence or alcohol abuse" and inserting in lieu thereof "or alcohol dependence or abuse".

Section 5H1.5 is amended by deleting "guidelines or where within the guidelines" and all that follows through the end of the section and inserting in lieu thereof "applicable guideline range.", and by inserting the following additional paragraphs:

"In addition, employment record is not ordinarily relevant in determining whether a term of imprisonment should be imposed or the length of any term of imprisonment within the applicable guideline range (28 U.S.C. 994(e)).

Employment record may be relevant in determining the conditions of probation or supervised release (e.g., the appropriate hours of home detention).".

Section 5H1.6 is amended by deleting "guidelines. Family responsibilities that are" and all that follows through the end of the section and inserting in lieu thereof "applicable guideline range.", and by inserting the following as an additional paragraphs:

"In addition, family ties and responsibilities, and community ties, are not ordinarily relevant in determining whether a term of imprisonment should be imposed or the length of any term of imprisonment within the applicable guideline range (28 U.S.C. 994(e)).

Family responsibilities that are complied with may be relevant to the determination of the amount of restitution (§ 5E1.1 (Restitution)) and fine (§ 5E1.2 (Fines for Individual Defendants)).".

Reason for Amendment: This amendment revises policy statements §§ 5H1.1-5H1.6 to make them clearer, to eliminate inconsistencies in the treatment of similar factors, and to more clearly highlight the relationship of these policy statements to the statutory directive to the Commission in 28 U.S.C. 994(e).

#### CHAPTER FIVE, PART K (DEPARTURES)

68. Proposed Amendment: Chapter Five, Part K, Subpart 2, is amended in the title by deleting "GENERAL PROVISIONS" and inserting in lieu thereof "OTHER GROUNDS FOR DEPARTURE".

Section 5K2.0 is amended in the first paragraph by inserting "that should result in a sentence different from that described" immediately following "the guidelines" in the first sentence; by deleting the third sentence; by deleting

"the present section" and inserting in lieu thereof "this subpart", by deleting "fully" immediately before "take", by inserting "fully" immediately following "account", and by deleting "precise" and inserting in lieu thereof "the" in the fourth sentence; and by deleting "judge" and inserting in lieu thereof "court" in the sixth sentence.

Section 5K2.0 is amended in the second paragraph by inserting ", for example," immediately following "Where", by deleting "guidelines, specific offense characteristics," and inserting in lieu thereof "offense guideline", by deleting "part" and inserting in lieu thereof "subpart", by deleting "guideline" and inserting in lieu thereof "applicable guideline range", and by deleting "of conviction" immediately following "offense" in the first sentence; by deleting "offense of conviction" and inserting in lieu thereof "applicable offense guideline" in the second sentence"; by deleting "offense of conviction is theft" and inserting in lieu thereof "theft offense guideline is applicable", by deleting "when" immediately before "the theft", and by inserting "range" immediately before "more readily" in the third sentence; and by deleting "offense of conviction is robbery" and inserting in lieu thereof "robbery offense guideline is applicable", and by deleting "sentence" immediately before "adjustment" in the fourth sentence.

Section 5K2.0 is amended by deleting the fourth paragraph.

Reason for Amendment: This amendment deletes surplus language, and improves the clarity of the policy statement.

#### CHAPTER SEVEN (VIOLATIONS OF PROBATION AND SUPERVISED RELEASE)

69. Guidelines for Revocation of Probation and Supervised Release. Two options have been developed to address this issue. These proposals are quite different in operation and result. Under Option 1, violations of probation and supervised release would be divided into three grades, with a different guideline range for each. In the case of a conviction for a new offense committed on probation or supervised release, the court would impose the revocation penalty to run consecutively to any penalty imposed for the new offense by a federal, state, or local court. The revocation penalty would be a separate penalty and the guidelines would not attempt to coordinate the revocation penalty with the penalty for the new offense. Under Option 2, in contrast, the court would in the case of a finding of

new criminal conduct be directed to apply the guideline system exactly as if the defendant had been convicted of that new criminal conduct in federal court and recalculate the criminal history score (e.g., the revocation offense would be treated as the instant offense, and the offense resulting in probation or supervised release would be treated as prior criminal history). The resulting guideline range would coordinate the revocation penalty with any sentence imposed by a federal, state, or local court for that conduct. For example, if the applicable guideline range for the new criminal conduct was 12-18 months, and the defendant received a state sentence of 8 months, a revocation term of either 12-18 months to be served concurrently, or 4-10 months to be served consecutively would produce an appropriate sentence within the guideline range.

The Commission requests comment on the feasibility and appropriateness of both options, or on a combination thereof.

The two options follow:

Option 1: "Chapter Seven—Violations of Probation and Supervised Release" is deleted in its entirety and the following inserted in lieu thereof:

#### **"CHAPTER SEVEN—VIOLATIONS OF PROBATION AND SUPERVISED RELEASE"**

##### *Introductory Commentary*

This chapter provides rules for violations and revocations of probation and supervised release. To the extent permitted by statute, the guidelines treat violations of probation and supervised release as functionally equivalent. The sentence imposed upon revocation is envisioned as a sanction for failure to abide by the conditions of supervision and not as a sanction for new criminal conduct that may be the basis for the violation. The guidelines envision that new criminal behavior will be appropriately sanctioned by the court that has jurisdiction. The determination of the appropriate punishment is unrelated to the sentence imposed upon revocation. When a defendant fails to abide by the technical conditions of supervision or commits new criminal conduct of a patty or minor nature, the guidelines provide flexible alternatives to revocation and incarceration. However, a sentence of imprisonment is mandated when the violation constitutes criminal conduct that is more serious. The sentence imposed upon revocation is to be served consecutively to any sentence imposed for new criminal conduct.

#### **§ 7A1.1 Classes of Violations**

(a) Class I: Violation of any condition of probation or supervised release that constitutes new criminal conduct involving a crime of violence or violation of the drug laws.

(b) Class II: Violation of any condition of probation or supervised release that constitutes new criminal conduct not described in Class I or Class III; new criminal conduct not described in Class I that is punishable by imprisonment for a term exceeding one year.

(C) Class III: Violation of any technical condition of probation or supervised release; and new criminal conduct for the following offenses and offenses similar to them, by whatever name they are known:

minor theft and minor property offenses  
minor assault without striking or beating  
contempt of court  
disorderly conduct or disturbing the peace  
driving while intoxicated  
driving without a license or with a revoked or suspended license  
careless or reckless driving  
leaving the scene of an accident  
minor traffic infractions  
false information to a police officer  
gambling

hindering or failure to obey a police officer  
local ordinance violations  
non-support

prostitution  
resisting arrest  
trespassing  
hitchhiking  
juvenile status offense and truancy  
loitering  
public intoxication  
vagrancy

##### *Commentary*

##### *Application Notes:*

1. When the violation involves new criminal conduct, the court shall determine the class of violation based upon the defendant's actual conduct. The court is not limited by whether a conviction exists for this conduct. However, where the defendant is convicted of a felony, the violation will be deemed to be Class I or II violation.

2. "Crime of violence" includes any offense under federal or state law punishable by imprisonment for a term exceeding one year that (i) involves conduct that includes the use, attempted use, or threatened use of physical force against the person of another, or (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

3. "Violation of the drug laws" includes a broad range of offense behavior, i.e., any offense under a federal or state law that prohibits the manufacture, import, export, or

distribution of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with or without intent to manufacture, import, export, or distribute. This definition includes conspiracies to commit such offenses and simple possession of a controlled substance.

4. "Minor thefts" and "minor property offenses" include offenses involving a loss of \$200 or less that did not result in any threat or injury to a person. Purse snatching, pickpocketing, burglary, and arson are among the offenses not covered by this definition.

#### **§ 7A1.2 Reporting Violations**

(a) Class I and II: The probation officer shall report in writing to the court all Class I and II violations of probation or supervised release;

(b) Class III: The probation officer shall report in writing to the court all Class III violations of probation and supervised release unless the officer determines that non-reporting:

(1) Will not present an undue risk to the public;

(2) Will not depreciate the defendant's or the public's respect for the justice system; and

(3) Is consistent with the sentencing court's intention for placing the defendant on supervision.

#### **§ 7A1.3 Warrants and Violation Hearings**

(a) Class I and II: The court shall issue a violator's warrant or a summons to appear and conduct a violation hearing in accordance with Rule 32.1, Federal Rules of Criminal Procedure, for all Class I and II violations of probation or supervised release;

(b) Class III: The court shall assess the purposes of sentencing, the nature and circumstances of the violation, and the criminal history and other characteristics of the defendant in determining whether to issue a violator's warrant or a summons to appear. If deemed appropriate, the court shall conduct a violation hearing in accordance with Rule 32.1, Federal Rules of Criminal Procedure, for all Class III violations of probation and supervised release.

##### *Commentary*

##### *Application Note:*

1. Rule 32.1 requires that "whenever a probationer is held in custody on the ground that the probationer has violated a condition of probation, the probationer shall be afforded a prompt hearing before a \*\*\* judge or magistrate to determine whether there is probable cause to hold the probationer for a revocation hearing."

**§ 7A1.4 Sanctions Imposable for Violations of Probation and Supervised Release**

(a) Class I

(1) Upon finding of a violation, the court shall revoke probation or supervised release and impose a new sentence of imprisonment within the guideline range of 18–24 months.

(b) Class II

(1) Upon finding of a violation, the court shall revoke probation or supervised release and impose a new sentence of imprisonment within the guideline range of 12–18 months.

(c) Class III

Upon finding of a violation, the court shall:

(A) Revoke probation or supervised release and impose a new sentence of imprisonment within the guideline range of 1–7 months; or

(B) Continue or extend the term of supervision (not to exceed the maximum sentence authorized by statute) and modify the conditions to afford more intensive supervision.

(d) Class I, II, and III

(1) To the extent permissible by law, the court shall impose a term of supervised release to follow the term of imprisonment imposed upon revocation.

*Commentary*

*Application Notes:*

1. The court shall revoke supervision and impose a new sentence of imprisonment for new criminal conduct described as Class I and II violations. Class III violations do not require the imposition of a new sentence of imprisonment. This distinction permits the court sufficient flexibility to impose sentences that include community confinement and treatment programs in appropriate cases. Revocation and imposition of a sentence of imprisonment should result, however, regardless of the class of the violation, when a defendant with a previous violation for new criminal conduct violates the terms of supervision by committing additional criminal conduct.

2. Title 18 U.S.C. 3565 and 3583 require that supervision be revoked for possession of a controlled substance and the court impose a sentence of at least one-third the term of the original sentence. (E.g., a five year term of supervised release was imposed and the defendant is found to be in possession of a controlled substance; the statute requires the court to impose a prison sentence not less than one-third of the term of supervised release, or twenty months in this example.) When the statute and the guidelines conflict, the statute controls. (See § 5G1.1.)

3. A court considering revocation need not await a defendant's conviction on the new criminal conduct that serves as the basis of the revocation. If the court finds that a violation has occurred, it may revoke probation or supervised release. This is particularly important where it appears that a pending criminal charge which is the basis

for the violation will not be disposed of prior to the expiration of supervision. Under those circumstances, the court should proceed with violation/revocation absent a new conviction.

4. If violation/revocation occurs while the defendant has not completed service of the original sentence, the defendant must first satisfy the original sentence.

5. Community confinement, intermittent confinement, and home detention are not available as substitutes for imprisonment for the sentence imposed upon revocation. To the extent permitted by statute, these alternatives are available when the court has not revoked the sentence of supervision but instead modifies the conditions of supervision or extends the period of supervision.

**§ 7A1.5 Imposition of Sentence for Violations**

(a) Upon revocation, no credit shall be given for time served under probation or supervised release.

(b) Incarceration imposed upon revocation shall run consecutively to any period of custody the defendant is serving, whether or not the custody is related to the conduct serving as the basis of the probation or supervised release violation.

*Commentary*

*Application Note:*

1. In general, the sentence imposed for new criminal conduct and the sentence imposed upon revocation are to be served consecutively. When supervision is revoked for criminal conduct that represents a new federal offense, the sentence imposed for the new federal offense is to be served consecutively to the sentence imposed at revocation. In this limited instance, the provisions of § 5G1.3 do not apply.

Option 2: Sections 7A1.2, 7A1.3 and 7A1.4 are deleted in their entirety and the following inserted in lieu thereof:

**§ 7A1.2. Revocation of Probation**

(a) Upon a finding of a violation of probation involving new criminal conduct, other than criminal conduct constituting a petty offense, the court shall revoke probation.

(b) Upon a finding of a violation of probation involving conduct other than conduct described in subsection (a) above, the court may: (1) Revoke probation; or (2) extend the term of probation and/or modify the conditions of probation.

(c) (1) In the case of a revocation under subsection (a) above, the guideline range of imprisonment shall be the guideline range that would have been applicable if the new criminal conduct had constituted a federal offense and the defendant had been convicted of that offense, or 6–12 months, whichever is greater.

(2) In the case of a revocation under subsection (b) above, the guideline

range of imprisonment shall be 6–12 months.

(d) (1) The provisions of § 5C1.1 shall apply to any term of imprisonment required under subsection (c) above.

(2) Where a term of imprisonment is imposed, provisions of §§ 5D1.1–1.3 shall apply to the imposition of a term of supervised release."

(e) Any restitution, fine, community confinement, or intermittent confinement previously imposed in connection with the sentence for which revocation is ordered that remains unpaid or unserved at the time of revocation shall be added to the sanction imposed under subsection (c) above, and any such period of community confinement or intermittent confinement may be converted to an equivalent period of imprisonment.

*Commentary*

This guideline provides that probation is to be revoked in the case of new criminal conduct other than conduct constituting a petty offense. For lesser violations, the guideline provides that the court may revoke probation, extend the term of supervision, or modify the conditions of supervision.

When probation is revoked for new criminal conduct, it may be revoked prior to, at the same time as, or subsequent to, the imposition of a sentence on the new offense. The new offense may be a federal or, state, or local offense. There may be a conviction for the new offense, a pending charge, or no active prosecution. This section addressed these issues by setting forth the guideline that would have been applicable to the new criminal conduct had that conduct constituted a federal offense of which the defendant had been convicted, or a guideline of 6–12 months imprisonment, whichever is greater. This guideline will take into consideration that the defendant is a probation violator because the criminal history score will be recomputed (the conviction for the offense resulting in probation will count as prior criminal history and the defendant will receive 2 points under § 4A1.1(d) for being on probation).

In the case of a revocation for conduct constituting a petty offense or a technical violation, the guideline range will be 6–12 months of imprisonment.

Whether a term of imprisonment imposed upon revocation of probation should run consecutively or concurrently to any term of imprisonment that the defendant is serving at time of revocation as a result of an offense committed during the instant period of supervision shall be determined in accordance with § 5G1.3 (Imposition of a Sentence on a Defendant Serving an Unexpired Term of Imprisonment). Because the guidelines for probation revocation in the case of new criminal conduct incorporate an enhancement for the fact the defendant committed the offense while on probation through the recalculation of the criminal history score, the goal is to ensure that the combined term of imprisonment imposed for

the new offense and the probation violation is in accordance with the guideline range determined under this section.

#### **§ 7A1.3. Revocation of Supervised Release**

(a) Upon a finding of a violation of supervised release involving new criminal conduct, other than criminal conduct constituting a petty offense, the court shall revoke supervised release.

(b) Upon a finding of a violation of supervised release involving conduct other than conduct described in subsection (a) above, the court may: (1) Revoke supervised release; or (2) extend the term of supervised release and/or modify the conditions of supervised release.

(c) (1) In the case of a revocation under subsection (a) above, the guideline range of imprisonment shall be the guideline range that would have been applicable if the new criminal conduct had constituted a federal offense and the defendant had been convicted of that offense, or 6-12 months, whichever is greater.

(2) In the case of a revocation under subsection (b) above, the guideline range of imprisonment shall be 6-12 months.

(d) The provisions of § 5C1.1 shall apply to any term of imprisonment required under subsection (c) above.

(e) Any restitution, fine, community confinement, or intermittent confinement previously imposed in connection with the sentence for which revocation is ordered that remains unpaid or unserved at the time of revocation shall be added to the sanction required under subsection (c) above, and any such period of community confinement or intermittent confinement may be converted to an equivalent period of imprisonment.

(f) If a term of imprisonment imposed under this section is less than the time remaining on supervised release, the defendant shall be ordered to recommence supervised release upon his release from imprisonment, and the term of supervised release shall be the term of supervised release remaining at the time of revocation less the term of imprisonment imposed upon revocation.

#### *Commentary*

This guideline provides that supervised release is to be revoked in the case of new criminal conduct other than a petty offense. For lesser violations, the guideline provides that the court may revoke supervised release, extend the term of supervision, or modify the conditions of supervision.

When supervised release is revoked for new criminal conduct, it may be revoked prior to, at the same time as, or subsequent to, the imposition of a sentence on the new offense. The new offense may be a federal,

state, or local offense. There may be a conviction on the new offense, a pending charge, or no active prosecution. This section addresses these issues by setting forth the guideline that would have been applicable to the new criminal conduct had that conduct constituted a federal offense of which the defendant had been convicted, or 6-12 months, whichever is greater. This guideline will take into consideration that the defendant is a supervised release violator because the criminal history score will be recomputed (the conviction for the offense resulting in supervised release will count as prior criminal history and the defendant will receive two points under § 4A1.1(d) for being on supervised release).

In the case of a revocation for conduct constituting a petty offense or a technical violation, the guideline range will be 6-12 months of imprisonment.

Whether a term of imprisonment imposed upon revocation of supervised release should run consecutively or concurrently to any term of imprisonment that the defendant is serving at time of revocation as a result of an offense committed during the instant period of supervision shall be determined in accordance with § 5C1.3 (Imposition of a Sentence on a Defendant Serving an Unexpired Term of Imprisonment). Because the guidelines for supervised release revocation in the case of new criminal conduct incorporate an enhancement for the fact the defendant committed the offense while on supervised release through the recalculation of the criminal history score, the goal is to ensure that the combined term of imprisonment imposed for the new offense and the supervised release violation is in accordance with the guideline range determined under this section.

#### **§ 7A1.4. No Credit for Time Under Supervision**

(a) Upon revocation of probation, no credit shall be given (toward any sentence of imprisonment imposed) for any portion of the term of probation served prior to revocation.

(b) Upon revocation of supervised release, no credit shall be given (toward any term of imprisonment ordered) for time previously served on post-release supervision.

#### *Commentary*

This guideline provides that time served on probation or supervised release is not to be credited in the determination of any term of imprisonment imposed upon revocation.

#### **Appendix A**

70. Appendix A (Statutory Index) is amended by inserting the following in the appropriate place by title and section:

"18 U.S.C. 34.....	2A1.1, 2A1.2, 2A1.3, 2A1.4".
"18 U.S.C. 35(b).....	2A6.1".
"18 U.S.C. 219.....	2C1.3".
"18 U.S.C. 281.....	2C1.3".
"18 U.S.C. 332.....	2B1.1, 2F1.1".

"18 U.S.C. 335.....	2F1.1".
"18 U.S.C. 372.....	2X1.1".
"18 U.S.C. 808.....	2H2.1".
"18 U.S.C. 647.....	2B1.1".
"18 U.S.C. 650.....	2B1.1".
"18 U.S.C. 665(b).....	2B3.3, 2C1.1".
"18 U.S.C. 667.....	2B1.1, 2B1.2".
"18 U.S.C. 712.....	2F1.1".
"18 U.S.C. 753.....	2P1.1".
"18 U.S.C. 915.....	2F1.1".
"18 U.S.C. 917.....	2F1.1".
"18 U.S.C. 970(a).....	2B1.3, 2K1.4".
"18 U.S.C. 1023.....	2B1.1, 2F1.1".
"18 U.S.C. 1024.....	2B1.2".
"18 U.S.C. 103C(b).....	2X1.1".
"18 U.S.C. 1031.....	2F1.1".
"18 U.S.C. 1081.....	2H1.3".
"18 U.S.C. 1115.....	2A1.4".
"18 U.S.C. 1167.....	2B1.1".
"18 U.S.C. 1188.....	2B1.1".
"18 U.S.C. 1364.....	2K1.4".
"18 U.S.C. 1422.....	2C1.2, 2F1.1".
"18 U.S.C. 1541.....	2L2.3".
"18 U.S.C. 1716C.....	2B5.2".
"18 U.S.C. 1860.....	2R1.1".
"18 U.S.C. 1861.....	2F1.1".
"18 U.S.C. 1864.....	2Q1.6".
"18 U.S.C. 1981.....	2A2.1, 2X1.1".
"18 U.S.C. 1992.....	2A1.1, 2B1.3, 2K1.4, 2X1.1".
"18 U.S.C. 2072.....	2F1.1".
"18 U.S.C. 2118(d).....	2X1.1".
"18 U.S.C. 2197.....	2B5.2, 2F1.1".
"18 U.S.C. 2232.....	2J1.2".
"18 U.S.C. 2233.....	2B1.1, 2B3.1".
"18 U.S.C. 2272.....	2F1.1".
"18 U.S.C. 2276.....	2B1.3, 2B2.2".
"18 U.S.C. 2331(a).....	2A1.1, 2A1.2, 2A1.3, 2A1.4".
"18 U.S.C. 2331(b).....	2A2.1".
"18 U.S.C. 2331(c).....	2A2.2".

**Appendix A** is amended by deleting:

"18 U.S.C. 32(a) (1) (4).....	2K1.4, 2B1.3
18 U.S.C. 32(b).....	2A1.1-2A2.3, 2A4.1, 2A5.1-2A5.2, 2K1.4, 2B1.3".

and inserting in lieu thereof:

"18 U.S.C. 32(a), (b).....	2A1.1-2A2.3, 2A4.1, 2A5.1, 2A5.2, 2B1.3, 2K1.4";
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In the line beginning "18 U.S.C. 33" by inserting "2A2.1, 2A2.2," immediately before "2B1.3";

In the line beginning "18 U.S.C. 112(a)" by inserting "2A2.1," immediately before "2A2.2," and by inserting ", 2A4.1, 2B1.3, 2K1.4";

In the line beginning "18 U.S.C. 152" by deleting "2F1.1," and by inserting ", 2F1.1, 2J1.8" immediately following "2B4.1";

In the line beginning "18 U.S.C. 201(b)(1)" by deleting ", 2J1.3, 2J1.8, 2J1.9";

In the line beginning "18 U.S.C. 474" by inserting ", 2B5.2" immediately following "2B5.1";

In the line beginning "18 U.S.C. 476" by inserting ", 2B5.2" immediately following "2B5.1";

In the line beginning "18 U.S.C. 477" by inserting ", 2B5.2" immediately following "2B5.1";

In the line beginning "18 U.S.C. 496" by deleting "2T3.1" and inserting in lieu thereof "2F1.1";

In the line beginning "18 U.S.C. 545" by deleting "2Q2.2" and inserting in lieu thereof "2Q2.1";

In the line beginning "18 U.S.C. 549" by inserting "2B1.1," immediately before "2T3.1" and by inserting ", 2T3.2" following "2T3.1";

In the line beginning "18 U.S.C. 551" by inserting "2J1.2," immediately before "2T3.1";

In the line beginning "18 U.S.C. 642" by inserting ", 2B5.2" following "2B5.1";

By deleting:

"18 U.S.C. 666(a)..... 2B1.1, 2C1.1, 2C1.2, 2P1.1";

and by inserting in lieu thereof:

"18 U.S.C. 666(a)(1)(A)..... 2B1.1, 2F1.1  
18 U.S.C. 666(a)(1)(B)..... 2C1.1, 2C1.2  
18 U.S.C. 666(a)(1)(C)..... 2C1.1, 2C1.2";

In the line beginning "18 U.S.C. 755" by deleting ", 2X2.1";

In the line beginning "18 U.S.C. 756" by deleting ", 2X2.1";

In the line beginning "18 U.S.C. 757" by deleting ", 2X2.1";

In the line beginning "18 U.S.C. 842(a)" by deleting ", (h), (i)" by inserting in lieu thereof "-(g)";

In the line beginning "18 U.S.C. 844(f)" by inserting ", 2X1.1" following "2K1.4";

By deleting:

"18 U.S.C. 922(a) (1)-(5).... 2K2.3  
18 U.S.C. 922(b)..... 2K2.1  
18 U.S.C. 922(b) (1)-(3).... 2K2.3  
18 U.S.C. 922(d)..... 2K2.3  
18 U.S.C. 922(g)..... 2K2.1  
18 U.S.C. 922(h)..... 2K2.1  
18 U.S.C. 922(i)..... 2B1.2, 2K2.3  
18 U.S.C. 922(j)..... 2B1.2, 2K2.3

18 U.S.C. 922(k).....	2K2.3
18 U.S.C. 922(l).....	2K2.3
18 U.S.C. 922(n).....	2K2.1
18 U.S.C. 923.....	2K2.3
18 U.S.C. 924(c).....	2K2.4",

and by inserting in lieu thereof:

"18 U.S.C. 922(a)(1).....	2K2.1, 2K2.2
18 U.S.C. 922(a)(2).....	2K2.2
18 U.S.C. 922(a)(3).....	2K2.1
18 U.S.C. 922(a)(4).....	2K2.1
18 U.S.C. 922(a)(5).....	2K2.2
18 U.S.C. 922(a)(6).....	2K2.1
18 U.S.C. 922(b)-(d) .....	2K2.2
18 U.S.C. 922(e).....	2K2.1, 2K2.2
18 U.S.C. 922(f).....	2K2.1, 2K2.2
18 U.S.C. 922(g).....	2K2.1
18 U.S.C. 922(h).....	2K2.1
18 U.S.C. 922(i)-(l).....	2K2.1, 2K2.2
18 U.S.C. 922(m).....	2K2.2
18 U.S.C. 922(n).....	2K2.1
18 U.S.C. 922(o).....	2K2.1, 2K2.2
18 U.S.C. 923(a).....	2K2.2
18 U.S.C. 924(a)(1)(A).....	2K2.2
18 U.S.C. 924(a)(1)(C).....	2K2.1, 2K2.2
18 U.S.C. 924(a)(3)(A).....	2K2.2
18 U.S.C. 924(b).....	2K2.3
18 U.S.C. 924(c).....	2K2.4
18 U.S.C. 924(f).....	2K2.3
18 U.S.C. 924(g).....	2K2.3";

In the line beginning "18 U.S.C. 1704" by inserting ", 2F1.1" following "2B5.2";  
In the line beginning "18 U.S.C. 1751(c)" by inserting ", 2X1.1" following "2A4.1";

In the line beginning "18 U.S.C. 1751(d)" by inserting ", 2X1.1" following "2A4.1";

In the line beginning "18 U.S.C. 1909" by inserting "2C1.3," immediately before "2C1.4";

In the line beginning "18 U.S.C. 1951" by deleting "2B3.1, 2B3.2, 2C1.1,"  
In the line beginning "18 U.S.C. 1952A" by deleting "2A2.1,"

In the line beginning "18 U.S.C. 1958" by deleting "2A2.1,"

In the line beginning "18 U.S.C. 2271" by deleting "2F1.1,"  
By deleting "18 U.S.C. 4082(d) 2P1.1";  
by deleting:

"26 U.S.C. 5861(a)..... 2K2.3  
26 U.S.C. 5861(b)-(1)..... 2K2.2";

and by inserting in lieu thereof:

"26 U.S.C. 5861(a).....	2K2.2
26 U.S.C. 5861(b).....	2K2.1
26 U.S.C. 5861(c).....	2K2.1
26 U.S.C. 5861(d).....	2K2.1
26 U.S.C. 5861(e).....	2K2.2
26 U.S.C. 5861(f).....	2K2.2
26 U.S.C. 5861(g).....	2K2.2
26 U.S.C. 5861(h).....	2K2.1
26 U.S.C. 5861(i).....	2K2.1
26 U.S.C. 5861(j).....	2K2.1, 2K2.2
26 U.S.C. 5861(k).....	2K2.1
26 U.S.C. 5861(l).....	2K2.2";

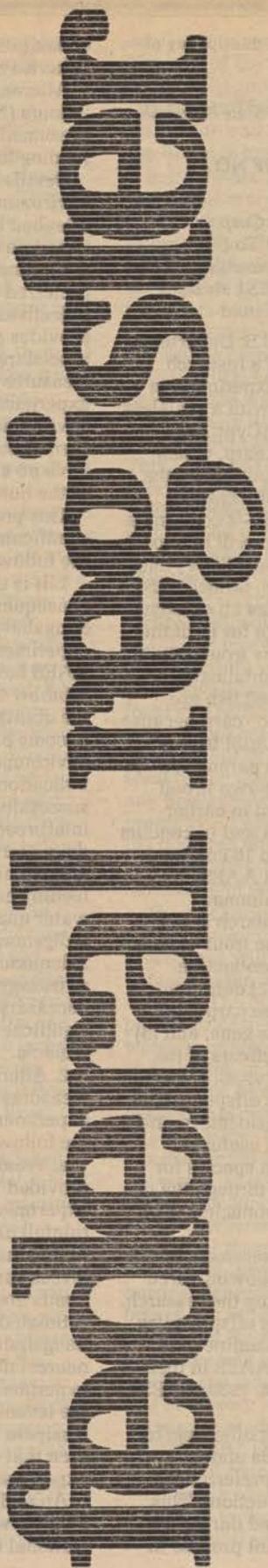
and in the line beginning "26 U.S.C. 5871" by deleting "2K2.2, 2K2.3" and inserting in lieu thereof "2A2.1, 2A2.2".

Reason for Amendment: This amendment conforms the statutory index to amended guidelines, and makes the statutory index more comprehensive.

[FR Doc. 90-3519 Filed 2-15-90; 8:45 am]

BILLING CODE 2210-40-M





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**Friday**  
**February 16, 1990**

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### **Part III**

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## **Department of Agriculture**

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**Cooperative State Research Service**

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**Research Proposed on Transgenic Fish;  
Publication of Environmental Assessment;  
Notice of Opportunity for Public  
Comment**

**DEPARTMENT OF AGRICULTURE****Cooperative State Research Service****Research Proposal on Transgenic Fish; Publication of Environmental Assessment**

**AGENCY:** Cooperative State Research Service, USDA.

**ACTION:** Notice of opportunity for public comment on environmental assessment and proposed FONSI.

**SUMMARY:** The Cooperative State Research Service (CSRS) advises the public through this notice that an environmental assessment (EA) and proposed finding of no significant impact (FONSI) have been prepared concerning a proposal submitted by the Alabama Agricultural Experiment Station to conduct research on carp which have been genetically modified using recombinant deoxyribonucleic acid (DNA) technology. The research would be carried out in a fish hatchery facility and in outdoor research ponds located in Lee County, Auburn, Alabama. Funding for the research would be provided from CSRS through the Hatch Act.

The EA and proposed FONSI are published immediately following this notice. Public comment is welcomed. The EA provides a basis for concluding that measures proposed to prevent escape of the transgenic carp and fertilized eggs from the test site are adequate, and that the research will not have a significant impact on the quality of the human environment.

The EA has been prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4331 et seq.), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500-1509), and (3) U.S. Department of Agriculture (USDA) regulations implementing NEPA (7 CFR part 1b).

**DATES:** Comments must be received by March 19, 1990.

**ADDRESSES:** Written comments may be submitted to Dr. Daniel Jones, Deputy Director, Office of Agricultural Biotechnology, U.S. Department of Agriculture, room 321-A, Administration Building, 14th and Independence Avenue SW., Washington, DC, 20250.

**FOR FURTHER INFORMATION CONTACT:** Dr. Daniel Jones at the above address, or telephone (202) 447-9165.

Done at Washington, DC, this 9th day of February, 1990.

John Patrick Jordan,  
Administrator, Cooperative State Research Service.

**PROPOSED FINDING OF NO SIGNIFICANT IMPACT***Research on Transgenic Carp in Confined Outdoor Ponds To Be Conducted at the Alabama Agricultural Experiment Station (AAES); Auburn University, Auburn, Alabama*

AAES has requested U.S. Department of Agriculture funding of a research proposal to conduct an experiment in confined outdoor ponds with a scaleless variant of common carp (*Cyprinus carpio*), termed "mirror" carp, which have been genetically modified by the chromosomal insertion of a cloning vector, pRSV-2. The pRSV-2 contains a gene for rainbow trout growth hormone, and the Rous sarcoma virus (RSV) long terminal repeat sequence, termed "RSV promoter", which provides an efficient molecular recognition site for initiating the production of rainbow trout growth hormone in the experimental carp. These genetically modified fish are referred to as "transgenic" carp because they contain genetic material from a source different from the parents. AAES proposes to artificially spawn brood transgenic carp, produced in earlier research studies, indoors and to conduct studies of the offspring in 10 confined outdoor ponds located at AAES, Auburn, Lee County, Alabama.

The purpose of the research is to (1) evaluate the effects of the trout growth hormone gene on the reproductive capacity of brood carp, (2) determine whether offspring of these carp inherit the trout growth hormone gene, and (3) determine what are the effects of the inherited gene on the survival, growth rate, and behavior of the offspring. The research will develop basic information that may in the future be useful in developing improved fish species for commercial aquaculture through the use of recombinant deoxyribonucleic acid (DNA) technology.

The environmental assessment of the research analyzes the following three alternatives for conducting the research.

Alternative 1—Rearing offspring/fry in outdoor ponds under confinement conditions proposed by AAES in their submission of February 8, 1989 (AAES Proposal).

Alternative 2—Rearing offspring/fry in outdoor research ponds under confinement conditions preferred by USDA (USDA preferred action). This alternative was developed during the environmental assessment process in

consultation with AAES and other fisheries science and ecology experts.

Alternative 3—Rearing offspring/fry indoors (No action). Alternative 3 is a presumed outcome if USDA denies funding for the proposed research.

Details of these alternatives and the environmental analysis are found in the attached Environmental Assessment. Based on the analysis, I have tentatively determined that Alternative 2 is the preferred action for achieving the objectives of the research. Alternative 2 provides an acceptable experimental procedure which contains adequate measures to prevent the release of experimental fish into the local environment and, therefore, the research carried out under these conditions will have no significant impact on the quality of the human environment.

This preliminary finding of no significant impact (FONSI) is based on the following factors:

1. It is uncertain what the immediate consequences would be on the Saugahatchee Creek watershed if the experimental fish were to escape the AAES facilities because the effect of the rainbow trout growth hormone gene on the ability of the carp to survive and become established in the local environment is not known. However, indications are that they could become a successfully established population and interbreed with existing common carp in the watershed. Because of their gregarious spawning activity and feeding habits, carp can adversely affect water quality, aquatic vegetation and indigenous organisms in the ecosystem. Adequate measures to prevent release of transgenic carp from AAES are necessary to mitigate any potentially significant adverse environmental impacts.

2. Alternative 2 provides adequate measures to prevent release of the experimental carp taking into account the following significant factors.

a. Weather conditions. Measures are provided to prevent escape of live experimental carp even though unusual rainfall and flood conditions may occur during the experimental period. The levees surrounding the experimental ponds are at least 0.8 feet above the estimated 100 year flood height of Saugahatchee Creek, which is the nearest natural body of water to the experimental ponds. Configuration of the levees will allow any flood water to dissipate first over an extensive pond area that does not contain the experimental transgenic carp.

An agricultural meteorologist will monitor weather forecasts provided by a National Oceanographic and

Atmospheric Administration weather station at Auburn University, and apprise AAES immediately of any prediction for severe flooding conditions. The research protocol contains emergency termination procedures for the experiment, should termination become necessary. These include treating the ponds with rotenone, a fast acting respiratory fish poison, in accordance with use conditions approved by the U.S. Environmental Protection Agency and the Alabama Department of Environmental Management. A decision on emergency termination will be made in consultation with the Alabama Department of Conservation and Natural Resources, if time permits.

Precautions are included to prevent heavy rainfall from causing the experimental ponds to overflow into the drainage canal. All ponds containing the transgenic carp will drain into two catch basin ponds through an overflow pipe 4 inches in diameter with a maximum flow rate of 9,500 gallons per hour. Distance between the overflow pipe and the top of the dikes surrounding each pond is 18 inches. Maximum rainfall in one month, recorded over 100 years, is 18 inches. Ponds initially will be filled with water 5 inches below the overflow pipe. If, due to evaporation and lack of rainfall, it becomes necessary to add water to the experimental ponds they will not be filled above 5 inches below the overflow pipe. Human failure to cut off the water at this point, still would not overflow the ponds because the diameter of the inlet pipe is only 1 inch with a maximum flow rate of 3,000 gallons, less if more than one pond is being filled. Overflow pipes between the ponds will have a box filters attached on each side with an open top 6 inches above the pipe to ensure that if the filters become clogged water will flow to the catch basin ponds and not flood over the dike.

Water in the catch basin ponds will be treated with rotenone and detoxified with potassium permanganate prior to discharge into the drainage canal leading to Saugahatchee Creek. Inlet water pipes for the experimental ponds will be filtered to prevent contamination of the water supply. The overflow pipes between the ponds will contain filters on both sides; the drainpipes of the catch basin ponds will also contain a filter. In addition, water discharged from the catch basin ponds, after treatment with rotenone and detoxification with potassium permanganate, will pass through a filter box before entering the environment. The mesh size of all filters initially will be 250 microns, which is

adequate to contain the smallest fry. The size of the filters will be increased as the carp grow to reduce risk of clogging and breaking. An appropriate inspection and maintenance protocol for the filters is provided.

b. Predators. Adequate measures exist to prevent escape of the carp from the experimental ponds by birds and other terrestrial predators. These measures, by restricting access of predators to the ponds, also will prevent any harm to predators from exposure to rotenone-treated water or contact with the transgenic carp. Ponds containing experimental carp and the two catch basin ponds will be surrounded by a locked chain link fence 8 feet high and topped with two strands of barbed wire. This fence will be anchored with a concrete base. One-half inch polyethylene bird netting will be installed on the chain link fence and across the top, completely enclosing the experimental site. An additional  $\frac{1}{16}$  inch wire screen perimeter fence, 18 inches high, will be installed on the chain link fence. The combination of these barriers will prevent access by birds, small animals such as snakes, frogs and rodents, and larger animals, such as muskrats and raccoons. The barriers will be formally inspected weekly, the inspection recorded, and any necessary repair will be made promptly. In addition, staff engaged in the research will be present daily and will immediately report any observed deficiency in the barriers.

The thickness of the levees/dikes, regular mowing, and inspection procedures will mitigate possible damage to the dikes by burrowing animals. The dike on one side of the perimeter of the experimental area, which is adjacent to a drainage canal, is 10 feet thick at the top and 40 feet thick at the base. Most of the remaining perimeter is contiguous terrain nestled into a hillside. The remaining perimeter has dikes averaging 7.5 feet thick above the water level (minimum of 6 feet) and tapering to 30 feet thick at the base. These narrower dikes are adjacent to additional research ponds, thus facilitating the detection and removal of burrowing animals that threaten to breach the security of the ponds containing the experimental fish. Levees and dikes will be formally inspected weekly, the inspection documented, and any necessary repairs promptly made. Burrowing predators have rarely been sighted at AAES and will be promptly removed if found.

c. Theft by humans. The above described locked enclosure of the experimental site, its location some

distance from any public road, and lighting of the area will discourage human access, except by authorized personnel associated with the research. Persons with authorized access will have been examined on their understanding of the importance of precautions contained in the research protocol to prevent escape of the fish from the test site. At least one trained person associated with the project will be present intermittently during the day to report any attempt at unauthorized access. University police will patrol the area at least twice a night and log each security check. No measures would provide an absolute guarantee of preventing a deliberate human theft, but reasonable precautions to prevent theft are included in the protocol together with public information activities seeking public cooperation.

3. Procedures proposed for the use of rotenone and detoxification of rotenone-treated water with potassium permanganate before discharge mitigate any adverse effects of these chemicals on the environment. Tricaine methanesulfonate will be used for the humane sacrifice of the fish. The amount of rotenone or tricaine methanesulfonate in the sacrificed fish to be buried on the premises at AAES will be small and will not have an adverse impact on the environment.

4. The size of the experiment and limited area of the experimental site (approximately one acre) make it feasible to supervise the research and implementation of mitigation measures.

5. It is highly improbable that adverse effects will result from the use of a viral DNA sequence in the genetic modification of the carp. The viral sequence used in the modification to promote expression of the rainbow trout growth hormone gene, known as the long terminal repeat (LTR), is derived from the avian RNA-tumor virus, Rous sarcoma virus (RSV). The LTR represents less than 10% of the viral genome and does not code for or express any protein. A complete copy of the genome of the avian virus is not present in the transgenic carp, and latent retroviruses or oncogenes that the LTR might activate are not known to occur in this species. The LTR is believed to function in the integration of DNA into a host chromosome, as well as in promoting the expression of genes placed under its control. It is not expected to promote expression of other genes in the carp. No impacts on human health or safety are anticipated from contact with the carp containing this RSV-LTR promoter. Furthermore, precautions taken to prevent escape of

the carp or contact with other fish or birds, mitigate any significant impacts, although none are anticipated, that might be associated with the RSV-LTR promoter.

Dated: February 9, 1990.

John Patrick Jordan,

Administrator, Cooperative State Research Service.

#### Environmental Assessment of Research on Transgenic Carp in Confined Outdoor Ponds

Proposed by the Alabama Agricultural Experiment Station, Auburn University, Auburn, Alabama

Prepared by Office of Agricultural Biotechnology, Office of the Secretary, U.S. Department of Agriculture

John Patrick Jordan,

Administrator, Cooperative State Research Service.

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#### Environmental Assessment

##### I. Abstract

The Alabama Agricultural Experiment Station (AAES) has requested U.S. Department of Agriculture (USDA) funding of a research proposal to conduct experiments with a partially scaleless variant of common carp, termed "mirror" carp, which have been genetically modified by the use of recombinant deoxyribonucleic acid (DNA) technology. The transformation

of the mirror carp was accomplished by the chromosomal insertion of DNA from a cloning vector, pRSV-2, introduced by microinjection into cells at an early stage of embryo development. The recombinant plasmid, pRSV-2, contained a gene for rainbow trout growth hormone under the promotional control of the long terminal repeat (LTR) from Rous sarcoma virus (RSV) and additional apparently non-functional flanking sequences of bacterial DNA used in construction of the pBR322-based plasmid. The LTR, a non-infectious regulatory sequence of DNA derived from RSV-ribonucleic acid (RNA), functions as an efficient recognition site for initiation of synthesis of the rainbow trout growth hormone protein in transgenic carp. Carp containing genetic material from a source other than the parents are termed "transgenic" carp. AAES proposes to artificially spawn transgenic carp, available from previous research, indoors, and to study the performance of their offspring in confined outdoor ponds located at their research facility in Auburn, Lee County, Alabama.

In accordance with the National Environmental Policy Act and implementing regulations, this environmental assessment examines possible effects of the proposed research on the quality of the human environment taking into account mitigation measures to minimize these effects. Three alternatives for the research are discussed: (1) The AAES proposal, (2) the USDA preferred action, which includes some modifications of measures proposed by AAES to prevent release of the experimental fish into the environment, and (3) probable action if USDA denies funding for the research.

##### II. Purpose and Need

###### 2.1 Introduction

The Alabama Agricultural Experiment Station (AAES) has requested U.S. Department of Agriculture (USDA) funding of a research proposal to conduct experiments with carp, which have been genetically modified by the use of recombinant deoxyribonucleic acid (DNA) technology, in outdoor research ponds. The ponds are located on the AAES research facility in Auburn, Lee County, Alabama. Funding is contingent on approval by the Administrator of the Cooperative State Research Service (CSRS), who must consider whether that action may have a significant impact on the quality of the human environment as required by the National Environmental Policy Act (NEPA) and the implementing regulations.

The carp that will be used in the proposed research are a partially scaleless mutant form of common carp (*Cyprinus carpio*), termed "Israeli" or "mirror" carp. Mirror carp have been transformed by the chromosomal insertion of DNA from a cloning vector, pRSV-2, introduced by microinjection into cells at an early stage of embryo development. The recombinant plasmid, pRSV-2, contained the gene for rainbow trout growth hormone under the promotional control of the long terminal repeat (LTR) from Rous sarcoma virus (RSV) and additional apparently non-functional flanking sequences of bacterial DNA used in construction of the pBR322-based plasmid. The LTR, a non-infectious regulatory sequence of DNA derived from RSV-RNA, functions as an efficient recognition site for initiation of synthesis of rainbow trout growth hormone protein in transgenic carp. Carp containing genetic material from a source other than the parents are termed "transgenic" carp.

The purpose of the research is to evaluate the effects of the trout growth hormone gene on the reproductive capacity of brood carp, determine whether the offspring inherit the trout growth hormone gene, and determine what the effects of the inherited gene are on the survival, growth rate, and behavior of the offspring. This research project is part of a research program at AAES to develop basic information that may, in the future, be useful in developing improved fish species for commercial aquaculture.

In earlier indoor experiments with the transgenic carp at AAES, more than half of the carp died and the remaining carp failed to reach a physiological state that would allow spawning. After receiving approval from Auburn University's Institutional Biosafety Committee (IBC), AAES placed the remaining 5 male and 4 female transgenic carp, which were between one and two years of age, into outdoor research ponds, segregated by sex. These ponds were determined by Auburn University's IBC to meet containment conditions required by the National Institutes of Health (NIH) Guidelines for Research Involving Recombinant DNA Molecules (NIH Guidelines) (1). AAES scientists believe this more natural pond environment will allow the transgenic carp to reach a physiological state for spawning.

When the carp are ready to spawn they will be brought indoors where they will be placed in sex-segregated tanks and artificially spawned. The fertilized eggs will be incubated indoors and the larvae will be maintained in indoor tanks for about 3 to 7 days after yolk-sac

absorption until they are at least 0.5 centimeter long, at which time they will be placed in confined outdoor ponds. For purposes of this EA, the term "fry" means the young transgenic carp when they have grown to at least 0.5 centimeter long.

A total of 50,000 fry are proposed for placement in 10 outdoor ponds, 5,000 fry stocked in each 0.1 acre pond. When the fry have grown to about 30 grams (3-4 months of age), the population density will be reduced to a total of 300 fish per pond, including both transgenic carp and control (non-transgenic) carp. These fish will be heat branded for identification. The fish will be grown for one year and then the experiment will be terminated before the fish reach sexual maturity.

Details of the proposed experiment are presented in Section 2.4 of this Environmental Assessment (EA). Mitigation measures to prevent release of the fish into the environment are discussed in section III.

The EA presents scientific data and other information evaluated by USDA concerning the potential environmental impact of the proposed research and the alternatives considered and their potential environmental impacts.

## 2.2 Need for Conducting the Research in Outdoor Ponds

AAES scientists believe that an outdoor pond environment will ensure a higher survival rate of transgenic fish, enhance their spawning ability, and increase the validity of the research findings on growth rate and behavior. A pond environment also will permit research with a larger number of fish, thus increasing the statistical validity of the results of the research.

### 2.2.1 Survival Rate

In past AAES experiments, both transgenic and non-transgenic "mirror" carp reared indoors exhibited high mortality rates. More than half of the transgenic carp one to two years of age died indoors. Outdoor ponds provide a more natural and healthy environment conducive to a survival rate greater than in indoor tanks, and allow the use of a larger number of fish in the study.

### 2.2.2 Spawning Ability

Transgenic "mirror" carp reared indoors at AAES did not achieve a physiological state for spawning. A similar lack of reproductive health was observed in controls, so the condition of the fish does not appear to be an effect of the introduced gene. AAES scientists believe that placing the mature brood fish in sex-segregated outdoor ponds

will provide an environment appropriate for the fish to reach spawning condition.

### 2.2.3 Utility of the Research

The proposed pond environment more closely resembles the environment in which many fish are reared commercially. Although it is premature to speculate on development of transgenic fish for commercial use, the applicability of basic research information on performance is enhanced if that research is conducted in an environment that more closely simulates a commercial setting. It is important to evaluate the offspring in outdoor ponds because of genotype-environment interactions (2, 3). Performance of a genotype will vary with the environment, and would be expected to differ in indoor tanks and outdoor ponds.

## 2.3 USDA Regulations and Review Process

The National Agricultural Research, Extension, and Teaching Policy Act of 1977 (7 U.S.C. 3121) designates the Department of Agriculture as the lead agency of the Federal Government for agricultural research, extension, and teaching in the food and agricultural sciences. The Act, through a 1985 amendment by the Food Security Act (Pub. L. No. 99-198, 1403, 99 Stat. 852), specifically directs the Secretary of Agriculture to establish appropriate controls for the development and use of the application of biotechnology to agriculture. To assist it in fulfilling those obligations, USDA has established a Federal advisory committee, the Agricultural Biotechnology Research Advisory Committee (ABRAC), to provide advice to the Department on matters of biosafety.

### 2.3.1 Research Funding Programs

Within USDA, the Cooperative State Research Service (CSRS) administers Federal funding of agricultural research under both a competitive research grants program and a cooperative funding program in conjunction with state agricultural experiment stations as authorized by the Hatch Act. Under the cooperative program, state agricultural experiment stations are apportioned funds for broad areas of investigation based on rural and farm populations within the state. Federal funds are matched by state funding. AAES has requested approval of Hatch Act funding to continue its research with transgenic carp, including rearing offspring in outdoor ponds.

### 2.3.2 Funding Agency Policy on Recombinant DNA Research

USDA regulations [7 CFR 3015.205(b)(3)] stipulate that as a condition of every USDA grant or cooperative agreement to institutions of higher learning, the recipient will assume primary responsibility for implementing proper conduct of recombinant DNA research, and it will comply with current NIH Guidelines for Research Involving Recombinant DNA Molecules. CSRS, in implementing the USDA regulations, requires that any recombinant DNA research be submitted to CSRS for approval and be accompanied by documentation that the institution's biosafety committee has approved the experiment (4). AAES has provided documentation that Auburn University's Institutional Biosafety Committee (IBC) concurs, pending further review by ABRAC, that the biosafety measures proposed by AAES for the pond experiments appear adequate for containment of the transgenic fish (memorandum of February 3, 1989 to Dr. Lowell Frobish, Director of AAES, from Dr. Paul Lemke, Chairman of Auburn University's IBC at that time).

### 2.3.3 Why USDA Conducted the Biosafety Review

Auburn University's IBC has determined that AAES has complied with Section III.B.4 of the NIH Guidelines in its laboratory experiments with the transgenic fish and placement of brood fish in outdoor ponds. Section III.B.4. of the NIH Guidelines is included in Appendix 4 of this EA. These research conditions also meet specifications for containment described in a draft revision to the NIH Guidelines (Appendix Q) pertaining to research involving whole animals. Appendix 4 of this EA provides a relevant excerpt from a proposed version of Appendix Q, which was published in the *Federal Register* on December 30, 1988 (52 FR 29800).

The question may arise as to whether placing the transgenic fry in outdoor research ponds, as proposed by AAES, constitutes deliberate release into the environment under the NIH Guidelines. Before a deliberate release experiment can be undertaken, Section III.A. of the NIH Guidelines requires that NIH publish relevant information on the proposed experiment in the *Federal Register* providing 30 days for comment, that the Recombinant DNA Advisory Committee of NIH review the experiment, and that NIH grant an approval. In reviewing this EA, NIH has

taken the position that the proposed research is not a deliberate release experiment because the fish containing recombinant DNA are confined in contained facilities (holding ponds), and there is no plan to release the fish outside such facilities.

Although USDA requires adherence to the NIH Guidelines as a condition of funding, it has an independent obligation in its funding decisions and under the National Agricultural Research, Extension, and Teaching Policy Act, to ensure that appropriate controls are applied in research involving agricultural biotechnology. The Department also must ensure that its actions fully comply with its obligations under the National Environmental Policy Act. Because the AAES proposal is the first one involving research with transgenic fish in outdoor ponds considered for funding by USDA, and because of the Department's statutory obligations explained above, USDA has sought advice from ABRAC as part of its review of the proposal and has prepared this EA to be published for a 30 day comment period, before deciding whether to approve funding for the experiment under the Hatch Act.

#### 2.3.4 USDA Review Process

AAES initially submitted a proposal to CSRS for approval that encompassed a broad scope of research involving transgenic carp and catfish produced by the use of several different cloning vectors. This proposal was evaluated by six fisheries science peer reviewers, including a scientist from the U.S. Fish and Wildlife Service. Written comments from the reviewers were discussed with AAES scientists by USDA representatives that visited Auburn in March 1988. In January 1989, at the request of AAES, USDA scientists from CSRS, the Agricultural Research Service, and the Forest Service visited AAES, to discuss biosafety and environmental considerations with AAES scientists, and to advise AAES regarding their plans to submit a revised proposal to USDA. AAES had decided to narrow the scope of their original proposal to the study of transgenic carp containing rainbow trout growth hormone gene, and to modify and expand the protocol for confinement of fish in the outdoor ponds. The revised proposal was submitted on February 8, 1989 to the Director of the Office of Agricultural Biotechnology (OAB), USDA for review. The Director of OAB serves as the Executive Secretary to ABRAC. The Administrator of CSRS in consultation with the Director of OAB had decided that an ABRAC review of the proposal and a recommendation on

the biosafety aspects of the experiment would be useful to CSRS in its evaluation and decision regarding funding.

#### 2.3.4.1 USDA Advisory Committee and Public Meeting

At a public meeting on March 22-23, 1989, ABRAC reviewed the biosafety and confinement provisions of the AAES proposal, described as Alternative 1 in Section 3.1 of this EA. ABRAC also considered comments previously submitted by six fisheries science peer reviewers on the initial AAES proposal involving both transgenic carp and catfish.

Besides the AAES principal investigator, those attending the March meeting included representatives of the U.S. Environmental Protection Agency, USDA/Animal and Plant Health Inspection Service, Council on Environmental Quality, National Wildlife Federation, American Society for Microbiology, Industrial Biotechnology Association, Hill and Knowlton, Animal Health Institute, Science Magazine, Bio/Technology Magazine, Des Moines Register, and Washington Aquafarm Letter. Several representatives from these organizations offered specific oral and written comments on the AAES proposal.

#### 2.3.4.2 Advisory Committee Recommendation

After considering information presented at the public meeting of March 23, 1989, ABRAC recommended that the confinement conditions for the outdoor ponds and other safety measures described in the AAES proposal are sufficient to protect human health and the environment. This recommendation was provided to the Administrator of CSRS.

#### 2.3.4.3 Preparation of the Environmental Assessment

At the request of CSRS, OAB in consultation with a large number of experts analyzed the environmental impacts of the proposed research, considered alternatives, and prepared this EA. During the preparation of the EA, concerns were raised about some of the confinement conditions for the research. These concerns were discussed with AAES researchers, and AAES agreed to modify the protocol as described in Alternative 2 (The USDA preferred action), Section 4.2 of the EA. In developing and evaluating this alternative, site visits were made to AAES by several scientists from USDA, a scientist from the U.S. Fish and

Wildlife Service, five non-government fisheries science experts, and a water management engineer.

### 2.4 The Proposed Research and Protocols

#### 2.4.1 Experimental Design

The experimental design consists of three phases: bringing brood fish into spawning condition (phase 1 in progress); spawning the fish, incubating the eggs, and growing the larvae (phase 2), and rearing the fry (phase 3). Phase 1 has not been funded by USDA. If USDA denies funding, the experiment could be terminated if AAES so desires.

#### 2.4.1.1 Bringing Brood Fish Into Spawning Condition (Phase 1)

Five male and four female mature brood transgenic carp, heat branded for identification, are currently being maintained in two outdoor ponds, segregated by sex, until they reach a condition for spawning. This phase of the experiment is being conducted in accordance with Section III.B.4 of the NIH Guidelines, since it is not considered to be a deliberate release into the environment. Auburn University's Institutional Biosafety Committee has determined that the outdoor pond conditions for the brood fish are adequate to prevent escape of the fish into the local environment.

#### 2.4.1.2 Spawning the Fish and Growing the Larvae (Phase 2)

When the nine transgenic fish are ready for spawning, they will be brought indoors to a hatchery facility and kept in sex-segregated tanks for artificial spawning. The females will each be given an injection of carp pituitary extract (0.4 mg/kg body weight) followed in 12 hours by a second injection (3.6 mg/kg body weight) to induce ovulation. When the fish ovulate, eggs will be stripped into a bowl. Sperm will be extracted from the males over the eggs, salt water will be added to the mixture, and the contents of the bowl will be transferred to an aerated tank to incubate the fertilized eggs. The larvae will be grown in aerated indoor tanks for about 3-7 days after yolk-sac absorption until they are at least 0.5 centimeters (cm) long, at which time they will be placed in outdoor research ponds as described below.

When survival of an adequate number of offspring in the ponds is assured, the brood fish will be given a lethal dose of tricaine methanesulfonate (MS-222), and the carcasses will be frozen for subsequent tissue analysis. Tricaine methanesulfonate is an anesthetic

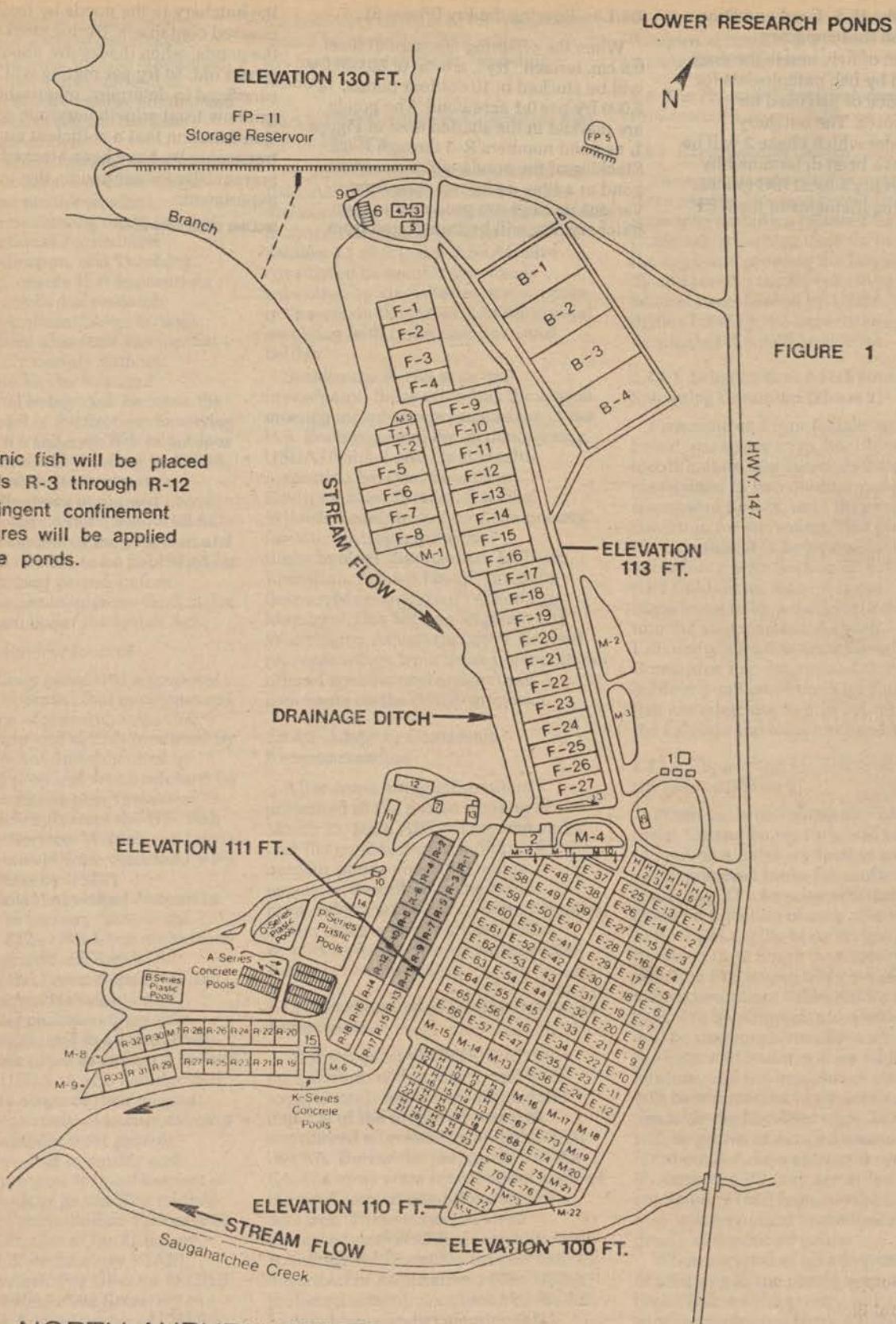
approved by the U. S. Food and Drug Administration for temporary immobilization of fish, and is the drug recommended by fish pathologists for humane sacrifice of fish used for research purposes. The hatchery conditions under which Phase 2 will be carried out have been determined by Auburn University's local IBC to meet containment requirements of the NIH Guidelines.

#### 2.4.1.3 Rearing the Fry (Phase 3)

When the offspring measure at least 0.5 cm, termed "fry", a total of 50,000 fry will be stocked in 10 outdoor ponds, 5,000 fry per 0.1 acre pond. The ponds are marked in the shaded area of Figure 1, as pond numbers R-3 through R-12. Stocking of the ponds will proceed one pond at a time as fry resulting from various matings are produced in the hatchery. Fry will be transferred from

the hatchery to the ponds by truck in covered containers. During stocking of the ponds, when the fry are about two weeks old, 50 fry per mating will be sacrificed to determine inheritance of rainbow trout growth hormone gene. Confirmation that a sufficient number of transgenic fry have been stocked, is a prerequisite for continuing the experiment.

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**NORTH AUBURN FISHERIES RESEARCH UNIT**

At about 3 months of age when the fish weigh approximately 30 grams, the population density will be reduced to 300 fish per pond for a total of 3,000 fish. This will be accomplished one pond at a time within the pond enclosure. First, the fish will be seined and held in the seining net at the end of the pond. Then, within the pond enclosure, about 400 of the fish will be individually weighed, fin clipped for DNA analysis, heat branded for identification, and held in a separate net in the pond until the results of the DNA analyses are completed. Based on the analyses, a total of 300 of the sampled fish, including transgenic and non-transgenic controls, will be selected for continuation of the experiment in that pond. It is expected that not all of the offspring will contain the rainbow trout growth hormone gene. Those fry that do not contain the gene will be selected as controls for the experiment. Excess fish will be transferred, using a small net, to a 200-300 gallon tank brought into the enclosed pond area to which a lethal dose of anesthesia MS-222 has been added. The sacrificed fish and treated water in the tank will be transported by truck to a suitable site on the AAES premises where the fish will be buried and the water poured on the ground.

Fish remaining in the experiment will be grown for one year, and the experiment will be terminated before the fish are sexually mature. During the experiment, a monthly inventory of the fish will be taken, and their growth and development will be monitored. At termination the fish will be harvested, given a lethal dose of anesthesia MS-222, and buried on the AAES premises in the manner described previously. AAES may wish to retain 30-40 of the transgenic fish for future research. Conditions under which some fish may be retained will be determined at a future time, after considering any pertinent new information that has been developed. No fish will be retained unless USDA approves the conditions under which they are retained. USDA approval will be contingent upon those conditions presenting no significant deviation that would alter the findings in this environmental assessment.

Protocols for minimizing potential for escape of the fish during experimentation are presented in Section III of this EA.

## 2.5 Background

### 2.5.1 Carp Biology and Ecology

#### 2.5.1.1 General Biology

A member of the minnow family (Cyprinidae), carp are native to Asia and were introduced into North America

in the 1880's. Mirror carp are a partially scaled, genetically selected form of the common carp (*Cyprinus carpio*). Mature adult carp frequently exceed 10 pounds in weight and 2 feet in length. The normal life span seldom exceeds 20 years.

#### 2.5.1.2 Reproduction and Fecundity

Sexual maturity varies with sex and growing conditions. The range for reaching sexual maturity is 1 to 5 years. The average male carp matures in 2 years with female carp usually reaching sexual maturity within 3 years. However, carp may mature earlier under controlled growing conditions. Spawning is temperature dependent. Most spawning occurs throughout the spring and early summer once water temperature reaches 63 °F (5). Spawning will cease at temperatures above 81 °F (5). Spawning begins with the adults congregating in groups in water 1 to 2 feet deep. During spawning several males may pursue a female, and the associated pursuit often splashes the water and roils the bottom sediments. Several hundred thousand to millions of eggs can be released by an individual female. The eggs sink and adhere to the bottom or to vegetation. Hatching time is temperature dependent. For example, eggs hatch in less than 3 days at 77 °F, but in cooler water may take 4 to 12 days to hatch (6). Newly hatched larvae are less than 0.2 inch long and remain attached to vegetation until they have completely absorbed their yolk sacs. This generally occurs by the fifth day.

#### 2.5.1.3 Feeding and Growth

Carp commonly feed by rooting on the bottom and sucking up quantities of silt which are then expelled as food items are selected from the water (5). The disruption of the sediments up to 5 inches deep during feeding causes substantial increases in water turbidity (7), and can have an adverse effect on the plant communities within the carp feeding areas. The mechanisms of these effects are by either the physical uprooting of aquatic plants, or the blockage of sunlight by the turbidity which causes the plants to die (8). However, other studies have shown that when carp were present in low densities, water turbidity was not significantly increased (9). Common carp prefer aquatic insects and invertebrates as food items, and seldom selectively graze on plants as is the habit with grass carp (*Ctenopharyngodon idella*).

Carp in natural systems often grow to 7 inches in the first year, with successive growth highly variable and

dependent upon environmental and genetic variables.

#### 2.5.1.4 Ecology

The gregarious spawning activities, disruptive feeding habits, and propensity of carp to displace existing fish species have all contributed to carp becoming the most often cited nuisance introduced fish in North America (10).

The displacement of existing fish populations when carp are introduced into a system is seldom caused by a direct competition for food, but rather the displacement is caused by carp physically disrupting the habitats used by the existing fish populations. Fish that rely on sight to capture prey are disrupted when carp feeding and spawning activities increase the water turbidity. Those fish that rely on aquatic plants to provide shelter from predation, or who feed upon the animals that colonize the plants, are displaced when the carp uproot the plant stands as they feed. Many species of fish deposit their eggs directly on the sediments during spawning. The eggs are then vulnerable to incidental ingestion by carp, or to burial as the sediments which the carp suck up during feeding settle through the water column. The above displacements occur most commonly in those systems that support mature carp (11).

Carp can also coexist with other warm water fish species, and often thrive in situations where water pollution has resulted in the decline of less tolerant native fish populations (12). In addition, carp can provide beneficial effects to an aquatic system by uprooting nuisance vegetation, and as juveniles, providing forage to certain game fish (8).

#### 2.5.1.5 Mirror Carp

Mirror carp are sometimes seen in waters of North America (5). In large populations of carp, many unusual patterns of scaling and color occur infrequently along with the predominant wild type. Data on crosses of carp with different scale cover show that the continuous pattern of scaling in common carp dominates over the "mirror" type of scale distribution (13).

The pleiotropic action of the "scale" gene in carp affects survival. Decreased survival of carp carrying the "nude" carp gene is a result of the unfavorable action of this gene upon a large number of traits, some of which are shown in the following table (13). Growth rate, ability to regenerate fins, and survival are expressed as percentages of the value in scaled carp taken for 100.

Indices	Scaled carp	Mirror carp
Growth rate.....	100	83-94
Mean No. gill lamellae.....	8.86	8.35
Ability to regenerate fins.....	100	76
Hemoglobin, percent.....	9.02	8.87
Survival (optimum conditions).....	100	91-98
Survival (unfavorable conditions).....	100	93-95

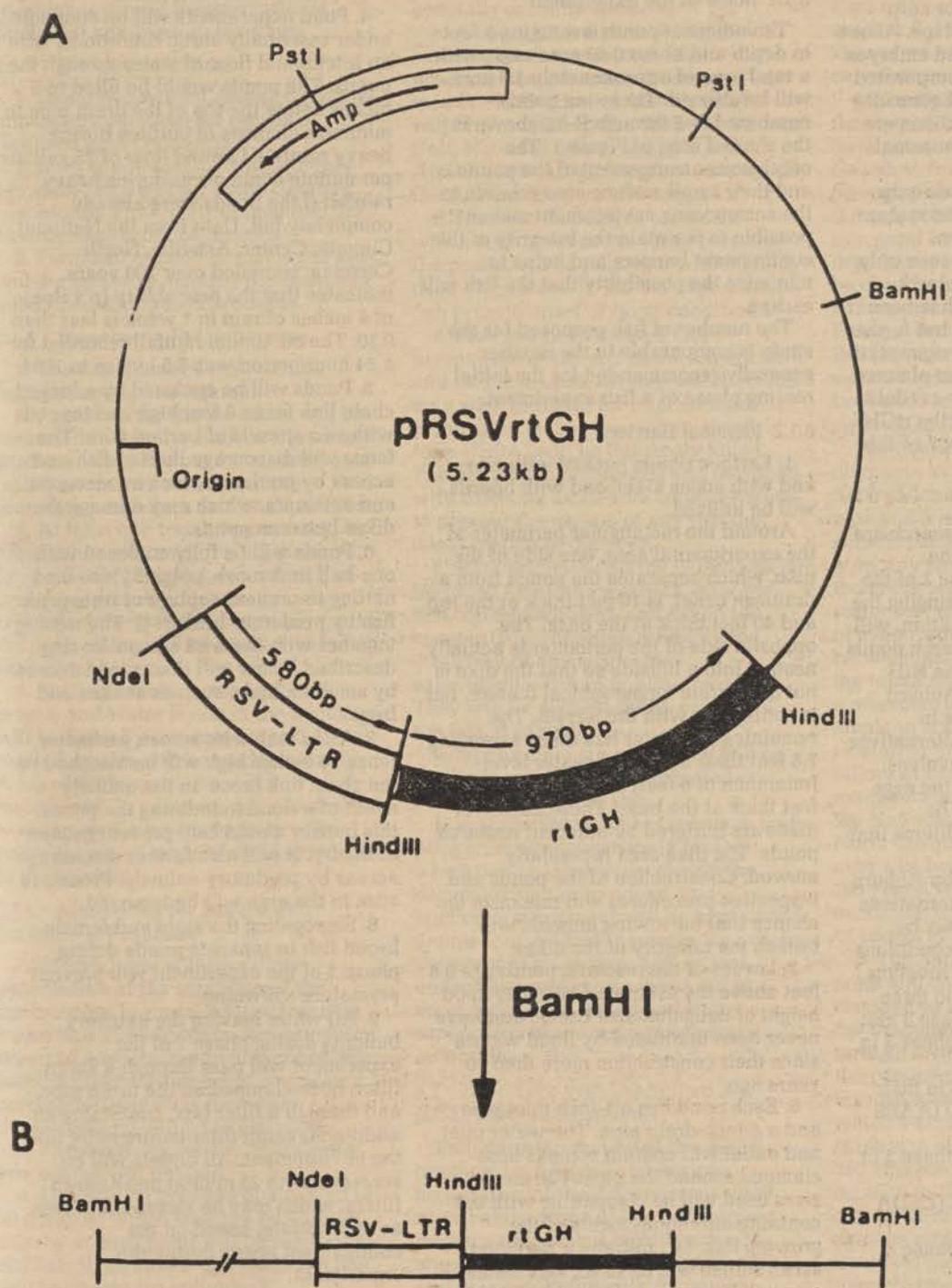
### 2.5.2 Genetic Modification of the Mirror Carp

The genetic transformation of the mirror carp was accomplished by the chromosomal insertion of DNA from a cloning vector, pRSV-2. The recombinant plasmid, pRSV-2 contained the gene for rainbow trout growth hormone (rtGH) under the promotional control of the long terminal repeat (LTR)

from Rous sarcoma virus (RSV) and additional apparently non-functional flanking sequences used in construction of the pBR322-derived plasmid. See Figure 2. The LTR, a non-infectious regulatory sequence of DNA derived from RSV-RNA, functions as an efficient molecular recognition site for initiation of synthesis of rtGH protein in transgenic carp.

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**FIGURE 2.** Structure of RSV Rainbow trout growth hormone recombinant plasmid. (A) Circular pRSVrtGH containing the rtGHcDNA (970 bp) at the Hind III site, along with RSV-LTR promoter (580 bp). (B) Bam HI linearized recombinant plasmid (5.23 kb) used for microinjection.



Further technical details and references on the construction of the PRSV-2 are given in Appendix 1 of this EA.

The recombinant DNA was linearized (Figure 2) prior to microinjection, and  $10^6$ - $10^8$  copies of the genetic material were microinjected into mirror carp embryos at the 1, 2 or 4 cell stage. About 30 percent of the microinjected embryos survived. About 5 percent incorporated from 1 to 5 copies of the rtGH gene into their chromosomes. The insertions are typical of a single copy chromosomal integration at multiple sites.

All of the resulting transgenic carp tested expressed both carp and mature rainbow trout growth hormone. Expression of rtGH has been seen only in red blood cells and not in blood serum. Not every carp tissue has been tested for expression to date, but further assessment of the rtGH gene expression and other biological effects are planned in the proposed research. The available evidence of the expression of the rtGH gene is presented in Appendix 2 of this EA.

### III. Alternatives

Three alternatives to the research are considered in this EA. All of the alternatives assume that phase 1 of the experiment, which involves bringing the brood fish into spawning condition, will be carried out in outdoor research ponds meeting the requirements of the NIH Guidelines and approved by Auburn University's IBC. This phase is in progress. Similarly all of the alternatives assume that phase 2, which involves spawning the fish, incubating the eggs and growth of the larvae, will be conducted indoors under conditions that meet requirements of the NIH Guidelines and are approved by Auburn University's IBC. The three alternatives considered are defined primarily by variation in the experimental conditions for conducting phase 3, which involves rearing of the offspring/fry. The three alternatives considered for phase 3 are:

Alternative 1—Conducting phase 3 in outdoor research ponds under conditions proposed by AAES in their submission of February 8, 1989 (AAES proposal);

Alternative 2—Conducting phase 3 in outdoor research ponds under conditions preferred by USDA (USDA preferred action); and

Alternative 3—Conducting phase 3 indoors (No action).

#### 3.1 Description of Alternative 1

In developing the protocol for the research, AAES considered various alternative measures to reduce the possibility of escape of the fish from the

outdoor research ponds or hatchery. After consulting with a number of experts before submitting their proposal to USDA for a review by ABRAC, AAES included the following confinement measures in the proposed action.

##### 3.1.1 Scale of the Experiment

Ten adjacent ponds averaging 3 feet in depth and about 0.10 acre each, with a total area of approximately 1.0 acre, will be utilized. These are ponds numbered R-3 through R-12 shown in the shaded area of Figure 1. The contiguous arrangement of the ponds and their small surface area relative to the surrounding environment makes it possible to maintain the integrity of the confinement barriers and helps to minimize the possibility that the fish will escape.

The number of fish proposed for the study is comparable to the number generally recommended for the initial rearing phase of a fish experiment.

##### 3.1.2 Physical Barriers

1. Earthen ponds packed with clay, and with edges stabilized with boards will be utilized.

Around the rectangular perimeter of the experimental area, one side of the dike, which separates the ponds from a drainage canal, is 10 feet thick at the top and 40 feet thick at the base. The opposite side of the perimeter is actually nestled into a hillside so that the dike is not a separate topographical feature, but is contiguous with the terrain. The remaining perimeter has dikes averaging 7.5 feet thick above the water level (minimum of 6 feet) and tapering to 30 feet thick at the base. These narrower dikes are buffered by adjacent research ponds. The dike area is regularly mowed. Construction of the ponds and inspection procedures will minimize the chance that burrowing animals will breach the integrity of the dikes.

2. Levees of the research ponds are 0.8 feet above the estimated 100-year flood height of Saugahatchee Creek, and have never been inundated by flood waters since their construction more than 30 years ago.

3. Each pond has a 1-inch inlet pipe and a 4-inch drain pipe. The water inlet and outlet will contain screens hose-clamped around the pipe. The mesh sizes used will be compatible with the containment requirements of the growing fish, i.e., initially a 25 micron saran screen will be used, and the mesh size will be increased up to 0.5 inches as the fry grow. When screens larger than 500 microns are appropriate, these will be made of hard plastic securely clamped to the pipe. Water is discharged from the ponds into an

adjacent open drainage canal through a common drain pipe servicing each pair of ponds. Just before entering the drainage canal, the discharged water will go through 1 of 5 filter boxes in which a screen of appropriate mesh size is stapled to a wooden frame.

4. Pond experiments will be conducted under essentially static conditions, with no intentional flow of water through the ponds. The ponds would be filled to 5 inches below the top of the drain pipe to minimize chances of outflow during heavy rainfall. Limited flow of 25 gallons per minute could occur during heavy rainfall if the ponds were already completely full. Data from the National Climatic Center, Asheville, North Carolina, compiled over 100 years indicates that the probability (p value) of 4 inches of rain in 1 week is less than 0.10. The maximum rainfall recorded for a 24 hour period was 8.5 inches in 1964.

5. Ponds will be enclosed by a locked chain link fence 8 feet high and topped with two strands of barbed wire. The fence will discourage theft of fish and access by predators, such as raccoons and muskrats, which may damage the dikes between ponds.

6. Ponds will be fully enclosed with one-half inch mesh, polyethylene bird netting to prevent capture of transgenic fish by predatory birds (14). The netting together with the wire screen fencing described below will discourage access by small animals, such as snakes and frogs.

7. A  $\frac{1}{16}$  inch wire screen perimeter fence 18 inches high will be attached to the chain link fence. In the unlikely event of a flood inundating the ponds, this barrier would help prevent escape of the fry. It will also further discourage access by predatory animals. Predators seen in the area will be removed.

8. Segregating the male and female brood fish in separate ponds during phase 1 of the experiment will prevent premature spawning.

9. All water leaving the hatchery building during phase 2 of the experiment will pass through a saran filter, hose-clamped on the drain pipe, and through a filter box, containing an additional saran filter before entry into the environment. All outlets will be screened with 25 micron mesh saran filters, which may be increased in size, as appropriate, based on the confinement needs during the experiment.

##### 3.1.3 Chemical Barriers

At termination of the experiment the fish will be harvested, humanely sacrificed using MS-222, and the ponds drained. Any remaining water will be

poisoned with rotenone at a dose calculated to ensure that all fish not harvested have been killed.

Rotenone is a respiratory poison commonly used to kill fish (15). When exposed to light and air, rotenone undergoes decomposition so that ponds in which it is used normally can be restocked in a week to ten days.

### 3.1.4 Biological Barriers

1. Brood fish will be spawned indoors, minimizing potential for escape of fertilized eggs and larvae.

2. Carp sperm and unfertilized eggs are viable in water for approximately one minute. Thus, their escape into the environment is not of concern.

3. Fertilized eggs of carp in water sink and are adhesive, making the escape of unhatched embryos improbable.

### 3.1.5 Security and Maintenance

1. The experimental area will be locked, posted, and lighted.

2. Access to the test facilities will be restricted to faculty, staff, and graduate students who have been instructed and tested on their knowledge of the biosafety procedures in this experiment.

3. At least one trained person will be present intermittently during the day, 7 days a week, to report any attempt at breaching security. University police will patrol the area at least twice during the night. A log will be maintained of all security checks.

4. Netting, fences, screens, filters, levees, and water levels in the ponds will be formally inspected weekly. Any needed repairs will be made promptly. A log of the inspections will be maintained. In addition, personnel working on the premises daily will promptly report any observed deficiency in the barriers.

### 3.1.6 Monitoring for Escape and Emergency Response

Although there will be a daily observation of the condition of the confinement barriers, a formal weekly inspection of all barriers, and prompt repair of any damage to prevent escape, monitoring procedures and emergency notification protocols have been developed and will be implemented.

1. The following specific monitoring procedures will be used:

a. Fish will be branded at a weight of 30 grams at which time the population density in each pond will be reduced to 300 fish. Each month thereafter the fish will be caught for individual measurements, which will provide a monthly indication of the surviving number of fish in each pond. Rate of maturation and sexual development will be observed to ensure that the

experiment is terminated before the fish are able to spawn.

b. Only fish with distinctive features for ease of recognition will be used in the study. For example, the "mirror" carp used in this study are only partially scaled whereas carp found in the wild generally are fully scaled.

c. An agricultural meteorologist will be designated to inform AAES whenever the prospect of severe weather is forecasted. Weather data will be provided by the Weather Service Unit, National Oceanographic and Atmospheric Administration, located on the Auburn University Campus.

d. If severe flooding is predicted which might breach the levee barriers, the ponds will be poisoned with a lethal dose of rotenone to kill the experimental fish prior to onset of flood conditions.

e. Fish will be harvested and inventoried at the end of the experiment, and all but a small number which AAES may wish to retain for future studies (contingent on subsequent approval from USDA) will be humanely killed. The ponds will be drained and poisoned with rotenone as an additional measure to prevent the escape of any fish that might remain in the pond.

f. State agencies and the public will be informed about the research, how the fish can be identified, and asked to cooperate by reporting promptly the discovery of any suspected experimental fish in public streams. They will be warned not to eat any of the fish, if caught.

g. Appropriate state agencies will be notified promptly of any reported or suspected escape of fish.

h. A sufficient supply of rotenone and potassium permanganate ( $KMnO_4$ ), which can be used to accelerate the decomposition of rotenone, and applicator equipment will be kept on the premises of AAES for emergency use. In the event of an escape, any actions undertaken would be carried out in accordance with the advice and supervision of the appropriate state authorities.

### 3.2 Description of Alternative 2—(USDA preferred action)

Following the review of the AAES proposal by ABRAC and during preparation of the EA, concerns were raised about some of the confinement measures presented in Alternative 1 above. In response to these concerns and in consultation with fisheries science experts, AAES agreed to the following modifications in the protocol presented in Alternative 1, to further reduce the potential for escape of the fish. Alternative 1 with these

modifications is the USDA preferred action.

#### 3.2.1 Physical Barrier modification

1. Use the same 10 ponds proposed in Alternative 1 for rearing the fry (pond numbers R-3 through R-12 shown in Figure 1), but add two ponds (pond number R-13 and R-14 shown in Figure 1) to serve as catch basins, one pond for each five ponds containing fry.

2. Construct a new overflow system that interconnects the ponds and terminates in the two catch basin ponds. Overflow from pond R3 would flow through pond R5, through pond R7, through pond R9, through pond R11, and into pond R13, which would normally be dry. An identical overflow system would be used for ponds R4, R6, R8, R10 and R12 emptying into catch basin pond R14. Existing drain pipes for pond numbers R-3 through R-12 containing experimental fish will be capped on both ends to prevent any water from entering or flowing through these pipes.

The overflow pipes will be 4 inches in diameter. With a maximum flow rate of 3,000 gallons per hour for the 1 inch inlet pipe and a maximum flow rate of 9,500 gallons per hour through the overflow pipe, any risks from accidentally adding too much water to the ponds when water replacement is necessary because of evaporation, is mitigated. Distance between the top of the overflow pipe to the top of the dike will be maintained at a minimum of 18 inches. This distance is ample to accommodate unusual levels of rainfall in the event of a short term failure of the overflow pipes to carry off excess water. According to reports of the National Climatic Center in Asheville, North Carolina, the maximum rainfall over a 24 hour period (recorded for over 100 years) was 8.5 inches in 1964; the maximum monthly rainfall recorded was 18 inches in 1961.

3. The outlet drain of each catch basin pond will contain a screen, hose-clamped to the pipe. Just before entering the drainage canal, water exiting through a common drain pipe servicing the two catch basin ponds will pass through a wooden frame filter box on which a screen has been stapled. The mesh size of the screens initially will be 250 microns, and will be increased up to 0.5 inch as the fry grow. Saran filters will be used up to 500 microns; larger screens will be of hard plastic. The overflow pipes installed through the dikes between ponds will have wooden box filters on each end of the pipe, to prevent fish from passing from one pond to another. The box filter will be mounted on stakes at the edge of the dike. It will consist of a wooden box

frame to which a screen of appropriate mesh size, as described above, is stapled to the bottom and sides. The top of the box filter will be left open. A rubber gasket will be used to seal the pipe where it enters the box filter. The box filter will be positioned so that the open top is no more than 6 inches above the pipe opening. In the event that the screen becomes clogged, this opening will assure that water and fish will pass to the catch basin ponds for poisoning and not over the dike to the drainage canal.

The minimum size filter of 250 microns is adequate to prevent escape of the smallest fish stocked in the ponds, and is less likely to become clogged and break than the 25 micron, minimum size filter proposed in Alternative 1. Filters of mesh size less than 0.25 inches will be inspected and cleaned daily. Those with mesh size equal to or greater than 0.25 inches will be inspected and cleaned weekly.

4. The dike between the experimental ponds and the drainage canal will be rebuilt so that:

a. The dike is at least 6 inches higher than the dike on the opposite side of the drainage canal. This will allow any flood water to dissipate first over ponds that do not contain the experimental transgenic carp.

b. The dike is at least 6 inches higher than the dikes (i) between the experimental ponds, and (ii) between the experimental ponds and the catch basin ponds. This will allow any overflow, should it occur, to pass into the catch basin pond and not to the drainage canal.

With these modifications in the dikes and drainage system there is little chance that heavy rainfall would cause overflow of the experimental ponds into the adjacent drainage canal. Emergency termination procedures will be implemented if, in monitoring of weather conditions, severe rainfall is predicted to cause unusual flood conditions. The decision to terminate will be made by the Director of AAES or a senior staff member in his absence. If time permits, AAES will consult with the Alabama Department of Conservation and Natural Resources regarding termination.

The modification of the drainage system, coupled with the water treatment modifications and termination procedures described below, reduce dependence on filters to prevent escape of experimental fish, and mitigate risks if those filters were to break.

5. The chain link fence, 18 inch high perimeter wire mesh fence, and polyethylene netting described in Alternative 1 will be extended to

enclose the two catch basin ponds as well as the experimental ponds. The gates and the fences connected to the gates will have a metal screen or plate attached. The screen or plate will allow the gates to open while maintaining the integrity of the confinement barriers. The bottom of the fence surrounding the ponds containing the experimental fish and catch basin ponds will be anchored in a cement footer.

These barriers will improve security and discourage access by unauthorized persons or by predators to ponds containing the experimental fish as well as the catch basin ponds.

6. Fry will be transported from the hatchery to the ponds in plastic buckets with lids. After transporting the fry, the plastic buckets and trucks will be washed out at a place where any fry that escaped from the buckets will not be washed into a drainage canal or creek.

### 3.2.2 Chemical Barrier Modification

1. Catch basin ponds (ponds into which all experimental ponds drain) will be treated with rotenone in accordance with Federal and state requirements to prevent any accidental release of the experimental fish into Saugahatchee Creek. A group of bioassay carp will be placed in a cage in the pond to confirm efficacy of the poison. The rotenone-treated water will be detoxified before release into the drainage canal leading to Saugahatchee Creek. Rotenone may be detoxified either by sunlight (16) or by the addition of a chemical oxidant, potassium permanganate ( $KMnO_4$ ) (17). The use of  $KMnO_4$  at the concentration needed to detoxify the rotenone, followed by a short period of about 24 hours for complete oxidation of the rotenone, does not pose an environmental risk. Oxidation is complete when the water, which turns purple on addition of the permanganate, changes to brown. AAES has contacted the Alabama Department of Environmental Management on its proposed use of rotenone, as required under the U.S. Environmental Protection Agency's reregistration standard for the use of rotenone. The Department notified Dr. John Plumb, Auburn University, in a letter dated November 15, 1989, that the proposed use of rotenone is acceptable, and a permit is not required because the facility produces less than 45,454 kilograms, harvest weight, of aquatic animals per year.

2. At termination of the experiment, the experimental fish will be removed from the ponds. The water remaining in the ponds will be treated with rotenone to kill any remaining experimental fish.

A group of bioassay carp will be placed in a cage in the pond to confirm efficacy of the poison. The rotenone-treated water will be detoxified with  $KMnO_4$ , and the rotenone allowed to completely oxidize prior to the ponds being drained.

### 3.2.3 Hatchery Modification

1. The hatchery facility will be locked to restrict unauthorized entry and posted to alert anyone entering it that special procedures must be followed.

2. A fine screen that will retain eggs and newly hatched larvae will be placed over all the floor drains in the room used for incubation and hatching. Also, a weighted screen of appropriate mesh size will be placed over the tanks. These screens will prevent young fish from jumping or sloshing out of the tanks, falling into the floor drains, and potentially escaping into the environment if the drain filters were to fail.

3. Hatchery water will be discharged through a pipe into a catch basin pond. The rate of flow from the hatchery will allow static conditions, i.e., no drainage, in the catch basin pond during the incubation of the eggs. Rotenone will be applied in the catch basin pond every four days, in accordance with registered use conditions. A daily bioassay will be conducted to confirm the efficacy of the poison by placing carp in a cage into the pond. After a sufficient time period has elapsed for any escaped eggs to hatch and the larvae to be killed by the rotenone, the water will be detoxified by the addition of  $KMnO_4$ , and the rotenone allowed to completely oxidize prior to discharge. Because rotenone is not an effective poison for fish eggs, it is necessary to continue rotenone poisoning until any eggs that may have escaped have hatched.

Hatchery procedures will conform to all containment requirements of Auburn University's IBC.

### 3.2.4 Other Modifications

1. After the facilities have been modified and prior to spawning in the hatchery, USDA will inspect the facilities to assure compliance with all requirements described for Alternative 2. Water level in the ponds will be lowered for the inspection in accordance with instructions from the inspection team.

2. AAES will develop written instructions regarding routine monitoring, maintenance and security checks. Written instructions will also be developed for the chemical treatment of the catch basin ponds and associated bioassays, and for emergency termination procedures.

3. In the case of a known or suspected escape of transgenic carp, the drainage canal leaving the Auburn Fisheries Research Unit will be blocked with a net. Rotenone will be applied to the full length of the drainage canal in accordance with a written protocol conforming to Federal and state rotenone use requirements. Immediately behind the net the rotenone will be detoxified by the addition of  $KMnO_4$ .

4. Auburn University's IBC has agreed to conduct unscheduled inspections of the facility and AAES compliance with prescribed operating procedures in the protocol, during the course of the experiment. The IBC will determine how often inspections should be made.

### 3.3 Description of Alternative 3—(No action)

If USDA denies funding of the research and advises AAES that it does not believe transgenic carp offspring should be placed in outdoor ponds, AAES may decide to continue its current experiments under the following conditions until the research is no longer productive.

Phase 1. Bringing the brood fish into spawning condition in sex-segregated in outdoor ponds.

Phase 2. Artificially spawning the fish indoors, and

Phase 3. Rearing the offspring/fry in aerated indoor tanks.

This third phase, i.e., rearing the offspring/fry in indoor tanks distinguishes Alternative 3 from Alternatives 1 and 2. Because of limitations in the number of fish that can be raised indoors at the AAES facilities—currently no more than about 100 fish can be reared to the adult stage—and the history of poor survival of mirror carp at AAES under these conditions, the expected number of offspring that could be studied would be significantly less compared to Alternatives 1 and 2. Consequently, the utility of the research would be significantly curtailed.

Presumably, measures that AAES would use to prevent escape of the fish would be determined by Auburn University's IBC, in accordance with the NIH Guidelines. Without specific knowledge of these measures, their effectiveness in preventing escape of experimental fish and eggs compared to Alternatives 1 and 2 can not be evaluated. Indoor research, however, would reduce concern about weather conditions and wildlife predators contributing to an unplanned release of the experimental fish.

## IV. Affected Environment

### 4.1 Research Facilities

Research pond facilities at AAES are located on a tract of AAES land approximately 4 miles north of the campus of Auburn University. Approximately 1600 acres of the tract have been set aside primarily for research and teaching in aquaculture and inland fisheries. Constructed on the Fisheries Research unit are 235 earthen ponds comprising approximately 222 acres of water. The ponds range in size from 0.05 acre to 22 acres. Located near the ponds are service buildings, equipment storage buildings, shops, feed and fertilizer storage, and a large fish holding/handling building. A fish processing/technology laboratory, a fish reproduction laboratory, and a fish nutrition laboratory are also located on the area.

### 4.2 Local Aquatic Ecosystem

The nearest natural body of water is Saugahatchee Creek which passes within approximately 400 yards of the AAES research ponds. The ponds and a portion of the creek are shown in Figure 1. Saugahatchee Creek originates approximately 3 miles northeast of the AAES and flows for over 45 creek miles before draining into the Tallapoosa River system at Yates Reservoir. The flow characteristics of Saugahatchee Creek are irregular and depend upon factors such as release from Saugahatchee Reservoir, rainfall, temperature, and outflow from municipal and industrial users located in Auburn and Opelika. Rivers in Alabama overflow about once per year on the average (18), with March the month with the greatest flood frequency (19). The tops of the levees of the research ponds are at least 0.8 feet above the estimated 100 year flood height for Saugahatchee Creek. Even under drought conditions flow would still be present in Saugahatchee Creek (20).

Saugahatchee Creek is a low order stream with intermediate water quality compared to neighboring streams (18). Water quality is oligotrophic in Yates Reservoir, the receiving water body of Saugahatchee Creek (21). Water temperatures have been infrequently collected, but reported values range from 10 °C in January to 24 °C in June (18) with up to a 7 °C variation in temperature occurring in as short of an interval as 12 days (20). The plant community in Saugahatchee Creek is dominated by lush periphytic and planktonic algal growths (18). Midges are the most common invertebrates in the creek (18). The fish community in Saugahatchee Creek is diverse with

minnows (mostly *Notropis* spp.) comprising about 67 percent and centrarchids (mostly bass and bluegills) comprising about 26 percent of the fish community (18). Mirror carp (*Cyprinus carpio*), the subject of the proposed test, have not been reported as such from Saugahatchee Creek, however, the creek does support a resident population of the non-mutant form of this carp (21,22). In addition, other non-native carp, including grass carp (*Ctenopharyngodon idella*), silver carp (*Hypophthalmichthys molitrix*), and bighead carp (*Aristichthys nobilis*) have either become established in Saugahatchee Creek or migrated to bodies of water up to 200 miles downstream (18,21). The source of introductions of these exotic species has not been established, although they have been used for research purposes in the United States. This experience indicates the need for adequate measures to prevent the unplanned release of fish used for experimentation. No endangered or threatened species have been reported from Saugahatchee Creek (23).

## V. Environmental Consequences

### 5.1 Introduction

It is uncertain what the immediate influence would be on the Saugahatchee Creek watershed if the transgenic and control mirror carp used in the proposed research were to escape the AAES facilities, but indications are that these carp could become a successfully established population. Interbreeding with the existing common carp assemblages would also be likely given the habitat and water temperatures that are favorable to carp spawning in the creek. The long-term effects of a transgenic mirror carp escape cannot be entirely predicted, but it is unlikely that they would differ in nature from those impacts observed from the introduction of common carp into the United States. However, the anticipated altered performance in growth rate of the transgenic mirror carp does suggest the likelihood of ecological impact on the existing aquatic ecosystem once an escape occurs. Whether the genetic transformation of the mirror carp would affect their ability to survive in Saugahatchee Creek is unknown.

### 5.2 Vegetation

The vegetation of Saugahatchee Creek could be adversely affected due to feeding behavior, a shading effect from water turbidity, and direct consumption should the experimental carp escape the AAES and become an established population. However, severe damage to

vegetation by carp has most often been reported in shallow still waters (8). Apart from the behavior of the fish, the presence of the rtGH gene itself will not impact aquatic vegetation. Given the precautions contained in protocol for the USDA preferred action (Alternative 2) to prevent escape of the experimental fish, significant impacts on aquatic vegetation are not anticipated.

Rotenone, a natural plant product derived from *Tephrosia vogelii* and related plants, has not been shown to be toxic to any aquatic or terrestrial plants (24).

### 5.3 Water Quality

The water quality of Saugahatchee Creek could be adversely affected by the increase in turbidity and nutrient resuspensions caused by the spawning and foraging activities of mirror carp should the carp escape the AAES. Apart from the expected behavioral characteristics of mirror carp, the presence of the rtGH gene itself in mirror carp is not expected to impact water quality. Given the precautions contained in the protocol of the USDA preferred action to prevent the escape of the experimental fish, significant impacts on water quality are not expected.

Rotenone is a respiratory poison that has varying degrees of toxicity toward invertebrates and vertebrates such as birds, reptiles, and mammals (15, 25). Therefore, its presence in water would be detrimental to water quality. Gilderhus et al. (26), have determined the half-life of rotenone in freshwater as 13.9 hours at 24 °C and 83.9 hours at 0 °C. The proposed use of rotenone in accordance with the EPA registration and subsequent detoxification procedures for the rotenone treated water will prevent rotenone from being released into local waters and affecting water quality.

### 5.4 Indigenous Organisms

The indigenous organisms in the Saugahatchee Creek ecosystem could be adversely affected by the physical disruption of the habitat and competition for food caused by the transgenic mirror carp should they escape the AAES and become an established population. Whether mirror carp containing the rtGH gene would have a competitive advantage over other carp or fish populations in this creek is unknown, but the potential may be more adverse than the release of non-transgenic mirror carp. The transgenic carp would be sexually compatible with indigenous non-transgenic common carp in Saugahatchee Creek.

The impact of Rous sarcoma virus (RSV) long terminal repeat sequence (referred to as the RSV-LTR) on indigenous waterfowl and fish populations is unknown, but no adverse effects are anticipated. Although RSV is an avian pathogen that induces tumors, the RSV-LTR sequence alone does not represent the entire viral genome and cannot replicate and initiate an infection independently. Potential risks of the RSV-LTR that have been considered are: (i) Possible activation of other genes, particularly oncogenes, (ii) transactivation of LTR by other gene products, (iii) induction of immunological intolerance to other retroviruses, and (iv) possible recombination with fish retroviruses. Each of these potential risks is discussed in more detail in Appendix 3. Given the precautions contained in the USDA preferred action to prevent escape of fish or their contact with waterfowl in the experimental ponds, and the lack of evidence suggesting the occurrence of any of the above potential risks, significant impacts associated with the RSV-LTR are not anticipated.

Rotenone is a potent fish poison. Release of rotenone into the Saugahatchee Creek would be extremely detrimental to indigenous fish stocks. In addition, rotenone has been shown to be toxic to aquatic and terrestrial invertebrates (27, 24). Rotenone is less toxic to birds. The oral LD<sub>50</sub> for mallards and pheasants is greater than 1 g/kg. Procedures for the planned use of rotenone are such that no adverse effect on indigenous organisms is expected.

Burial of experimental fish killed with rotenone or with tricaine methanesulfonate, MS-222, will have no adverse effect on the environment. The amount of rotenone and MS-222 per fish is small. The rotenone is chemically bonded to intracellular components of the fish. Therefore, free rotenone would not exist at the burial site. MS-222 is commonly used in fisheries research for humane sacrifice.

### 5.5 Human Health and Safety

No impacts on human health or safety are expected from contact with the transgenic carp. However, if the transgenic fish escape and are caught they should not be eaten because food safety has not been fully documented. No risk is expected from the rtGH gene itself. The gene is a very small part of the carp genetic makeup, and the resulting protein hormone occurs at low levels and is non-toxic and the same protein that occurs naturally in rainbow trout. An rtGH gene in carp could have unintended secondary effects by way of

positional or other effects on the carp genes that hypothetically could affect food safety. With the precautions included in the protocol to prevent escape of the experimental fish, the unique physical characteristics of mirror carp, and the public information activities which AAES plans to undertake, significant impacts on human health from fish consumption are not expected to occur.

Rotenone has a human oral LD<sub>50</sub> of 2.85 g/kg. In general, this value is similar to other toxicity values for mammals. If all label instructions for the use of rotenone are followed and the detoxification procedures are adhered to, then no human health risk is envisioned from the use of rotenone.

### 5.6 Socioeconomic Impacts

Research with transgenic carp is at an early stage of development. Any prediction of possible commercial application that may eventually evolve from the research would be highly speculative. Assessment of socioeconomic impacts at this time would be premature and meaningless. Precautions in the protocol for the USDA preferred action to prevent escape of the transgenic carp and the opportunity for these fish to be captured and used in commercial production mitigate the possibility of socioeconomic impacts.

### 5.7 Cumulative Impacts

No cumulative impacts are expected to arise from the experiment, if the precautions and procedures described in Alternative 2 are followed.

## VI. Conclusions

No significant impact on the quality of the human environment is expected if the mitigation measures in the study protocol as modified in Alternative 2 (USDA preferred action) are carried out. While Alternative 1 also provides substantial mitigation, it provides less assurance that fish will not escape and a greater potential risk of adverse impacts on the environment. Because the precise conditions under which AAES may elect to continue research if USDA does not approve the research are speculative (Alternative 3), conclusions about the environmental consequences and comparison of this alternative with other alternatives likewise would be speculative.

## VII. Public Notification

The AAES has worked diligently to communicate broadly the nature and expectations of the proposed research project to genetically transform fish

species of scientific and economic importance. Public communication has taken place through international, national and state newspaper coverage including The New York Times, television coverage, scientific reports in meetings and journals, experiment station publications and lectures, and consultations with State, Federal and interest-group representatives concerned with the consequences of the research.

Also, USDA will publish this EA in the *Federal Register*, providing a 30 day public comment period. Copies of the EA will be sent to persons who previously expressed an interest.

#### 7.1 Persons and Agencies Consulted

(1) Dr. William Gartland, National Institutes for Allergy and Infectious Diseases, National Institutes of Health.

(2) Nelson A. Wivel, M.D., Office of Recombinant DNA Activities, National Institutes of Health.

(3) Dr. John Fulkerson, Dr. William Carlson, Dr. Meryl Broussard, and Dr. David McKenzie, Cooperative State Research Service, USDA.

(4) Dr. Douglas Bolt and Dr. Richard Parry, Agricultural Research Service, USDA.

(5) Michael L. Werner, Esq., Animal and Plant Health Inspection Service, USDA.

(6) Dr. James McCann, National Fishery Research Laboratory, U.S. Fish and Wild Life Service, Gainesville, Florida.

(7) Dr. J. R. MacMillian, Dr. Graham Purchase, and Dr. Jonathan Pote, Mississippi State University.

(8) Dr. William Wolters, Louisiana State University.

(9) Dr. Anne Kapuscinski and Dr. George Spangler, University of Minnesota.

(10) Dr. Dennis Powers and Dr. Thomas Chen, Molecular Geneticists, Johns Hopkins University.

(11) Dr. Tim Townes, Molecular Geneticist, University of Alabama, Birmingham.

(12) Dr. Curtis Bird, Chairman, Institutional Biosafety Committee, Auburn University.

(13) Dr. David Bisaro, former Chairman, Institutional Biosafety Committee, Auburn University, currently at Ohio State University.

(14) Dr. Paul Lemke, former Chairman, Institutional Biosafety Committee, Auburn University.

(15) Mr. Ron Kriel, Environmental Safety Officer, Auburn University.

(16) Ms. Jane Rissler and Dr. Rudy Rosen, National Wildlife Federation.

(17) Mr. C.E. White and Mr. Charles Kelly, Alabama Department of Conservation and Natural Resources.

(18) Mr. Doug Schofield, Alabama Wildlife Federation.

(19) Mr. Dennis Holcomb and Mr. Robert Wattendorf, Florida Game and Freshwater Fish Commission.

#### VIII. List of Preparers of Environmental Assessment

Ms. Maryln Cordle, Sr. Regulatory Specialist, Office of Agricultural Biotechnology, USDA—Principal preparer.

Dr. Richard Witter, Veterinary Medical Officer, Agricultural Research Service, USDA.

Dr. Daniel Jones, Deputy Director, Office of Agricultural Biotechnology, USDA.

Dr. Sue Tolin, Department of Plant Pathology, Physiology, and Weed Science, Virginia Polytechnic Institute and State University.

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21. Personal Communication, Jon Hornsby, Alabama Game and Fish Commission, Montgomery, Alabama.
22. Personal Communication, Hank Bart, Auburn University, Auburn, Alabama.
23. Personal Communication, Pete Douglass, U.S. Fish and Wildlife Service, Daphne, Alabama.
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#### Appendix 1—Assembly and Structure of the Genetic Construct

The genetic construct used in the transgenic carp studies, denoted as pRSVLTR-rtGH cDNA, was assembled as follows. A Bam HI-Hind III fragment

containing GH cDNA sequences coding for the mature rainbow trout GH1 was isolated from pAF51 (Agellon and Chen, 1986). The DNA was blunt-ended and inserted into the Sal I site of plasmid pRSV-2 (Gorman, et al., 1982). The resulting construct (5.2 Kb), pRSVLTR-rtGH cDNA, contains 580 bp of the LTR sequence, 970 bp of the cDNA rtGH sequence and 3.7 Kbp of the pRSV flanking sequence. The 5' end of the CH cDNA sequence is linked to the RSV-LTR promoter by a 13 bp fragment corresponding [to] the multiple cloning site. The construct was linearized with Bam HI for microinjection into carp embryos.

The structure of the genetic construct is shown in Figure 2.

#### References:

- Agellon, L. B. and T. T. Chen. 1986. Rainbow Trout Growth Hormone: Molecular Cloning of cDNA and Expressions in *Escherichia coli*. *DNA* Vol. 5 (6) pp. 463-471.  
Gorman, C. M., G. D. Merlin, M. C. Willingham, I. Pastan, and B. H. Howard. 1982. The Rous Sarcoma Virus Long Terminal

Repeat is a Strong Promoter when Introduced into a Variety of Eukaryotic Cells by DNA-mediated Transfection. *Proc. Natl. Acad. Sci. USA* Vol. 79, pp. 6777-6781.

#### Appendix 2—Incorporation and Expression of the Genetic Construct in Transgenic Carp

The number of integrated copies of the gene ranges from 1-5. The insertions are typical of a single copy integration at multiple sites. The transgenic carp express mature rainbow trout growth hormone polypeptide in their red blood cells, but not in their serum. The investigators have not examined other tissues, but they anticipate that there is expression in other cell types as well.

The expression results in an increased growth rate of about 20 percent in the transgenic carp. The morphology and behavior of the transgenic carp appears to be unaffected. The observed frequency of deformities exhibited by the transgenic carp in the laboratory is not different from normal controls.

The investigators do not anticipate any other changes in the transgenic carp besides

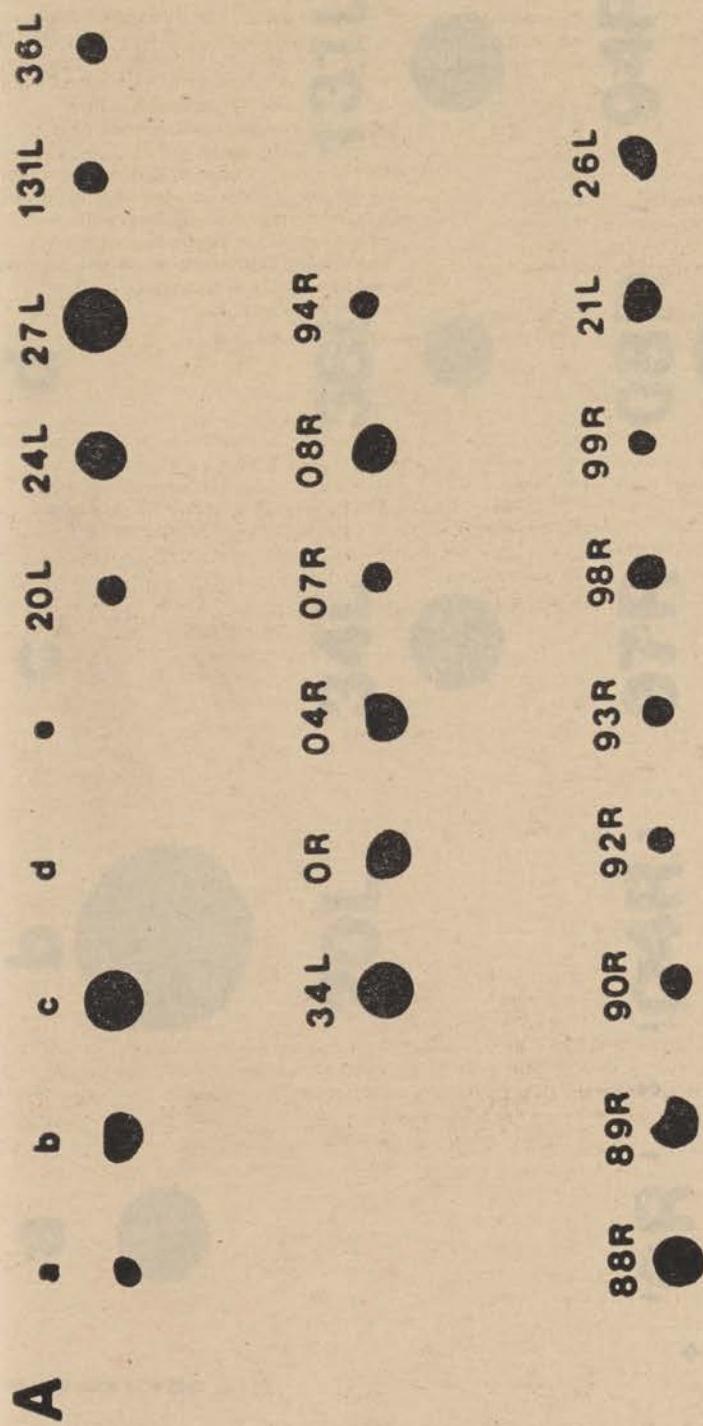
the expression of the rainbow trout growth hormone and the increased growth rate, although they will measure several other traits. These will include (1) Rate of fertilization, (2) hatching percentage, (3) growth and survival to two weeks, (4) growth and survival to 3 months, (5) growth and survival to 15 months, (6) expression of the RSVrtGHcDNA gene, (7) tissue distribution of expression, (8) inheritance of the gene, (9) morphology, (10) ease of capture by seine and ease of handling, (11) if disease or other stresses occur and their relative effects, (12) dressing percentage, (13) body composition, (14) age at sexual maturity, (15) rate of sexual maturation, and (16) fecundity. Other observations of a subjective nature on behavior will be made.

Dot blot data (Figure 3) and Southern blot data (Figure 4) are presented as evidence of genomic incorporation of the genetic construct shown in Figure 2.

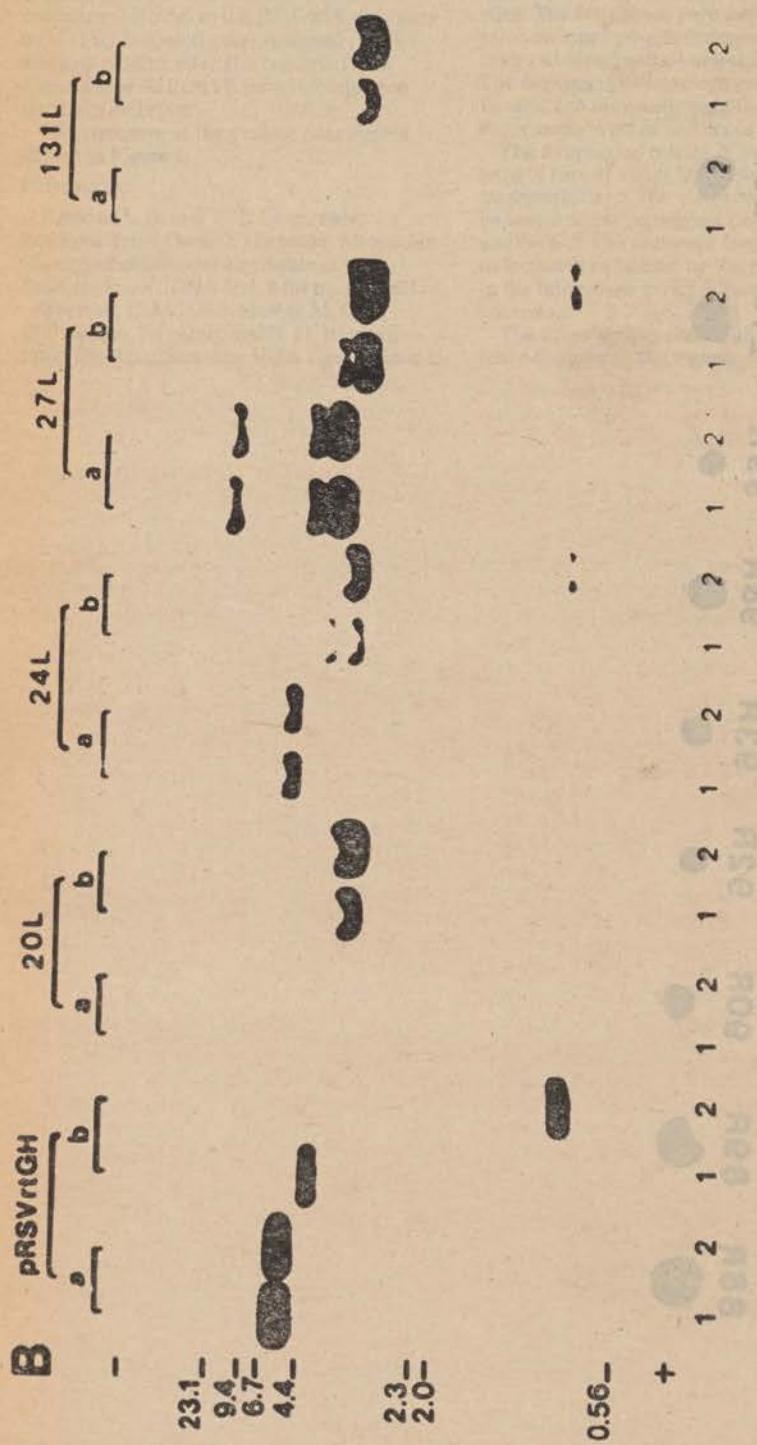
Evidence of rainbow trout growth hormone in red blood cells of transgenic carp is presented in Figure 5.

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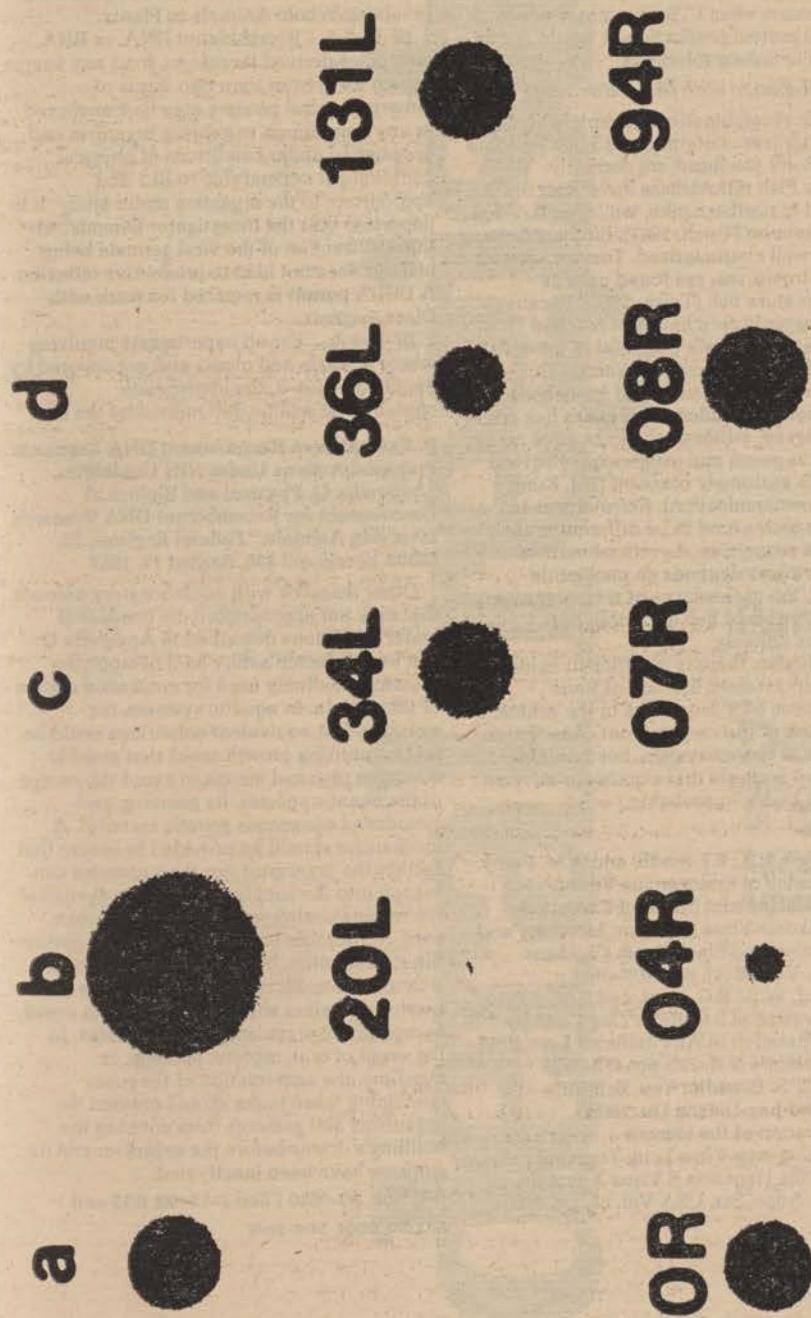
**FIGURE 3.** Dot Blot analysis of genomic DNA isolated from the presumptive transgenic (pRSVrtGHcDNA-1) Common carp. Genomic DNA (18 µg) isolated from pectoral fin was denatured and spotted onto a nylon membrane along with pRSVrtGH standards of 30 pg (a), 60 pg (b) and 150 pg (c), corresponding to 1, 2, and 5 copies of the integrated gene. Genomic DNA from non-transgenic carp (d and e) was included as negative control.



**FIGURE 4.** Southern Blot analysis of genomic DNA Isolated from the presumptive transgenic (pRSVrtGHcDNA-1) Common carp. BAM HI (a) and HIND III (b) digested genomic DNA (18 µg) was electrophoresed on a 0.8% agarose gel, transferred to a nylon membrane and hybridized either with probe 1 (580 bp LTR of RSV) or probe 2 (890 bp HIND III-HIND III fragment containing the rtGHcDNA).



**FIGURE 5.** Detection of Rainbow trout growth hormone (rtGH) in red blood cells of transgenic carp. Red blood cell extracts from transgenic carp were immobilized on a Terasaki plate, and bound to iodine-125 labeled goat anti-rabbit IgG. Rainbow Trout pituitary extract [0.1 g (a) and 0.2 g (b)] was included as positive control and normal carp red blood extract (c AND d) as negative control.



### Appendix 3—Potential Risks of Using the RSV Promoter in Transgenic Fish

There is currently little or no scientific information available regarding the possible interaction of the RSV-LTR genetic sequence with endogenous fish retroviral infections. As an alternative, Dr. R. L. Witter of the Agricultural Research Service has supplied information on inherited retroviral genes in chickens, the primary biological host of the Rous sarcoma virus. That information facilitates consideration of the following four types of potential risk of using the RSV promoter in transgenic fish.

#### 1. Activation of other genes

Retroviral integration in somatic cells may prompt tumor induction through activation of host oncogenes, a function of the 3' LTR which acts like an enhancer (Hayward, et al., 1981). Integration sites near the oncogenes are most effective. This phenomenon is specific for certain viral strains. LTR's from exogenous avian leukosis viruses are more efficient than those from endogenous viruses. Oncogenes are highly conserved and are undoubtedly present in the common carp. It is possible that the Rous sarcoma virus LTR might activate host oncogenes, causing neoplastic disease. However, no such disease has been observed by the investigators. This type of disease would be detected through pathologic examinations and would be manifested through increased mortality in transgenic animals. In no way would this pose a danger to humans handling the fish. Because a complete virus is not present, there is no risk of transmission through contact with the fish or through consumption in the unlikely event the fish escape confinement. Risks to the ecosystem seem small since, if this inserted gene decreases fitness, it may be self limiting in nature.

#### 2. Transactivation of LTR by other gene products

Integrated LTR's can be activated by various molecules, including proteins produced by viruses of the herpes and other groups, to function as a promoter (Seto, et al., 1988). It is possible that such proteins, if present, might transactivate the Rous sarcoma virus LTR in common carp. If so, the main effect probably would be an increase in the output of trout growth hormone. If this proved to be the case, little danger would be expected to occur. However, experiments should be monitored for evidence of unusual gene expression that might be related to environmental transactivating factors.

#### 3. Immunological tolerance leading to increased susceptibility to retroviral infection

Integrated retroviruses may express gene products that serve to reduce the ability of animals to respond immunologically to later infection with exogenous retroviruses of similar serotypes (Crittenden, et al., 1984). This requires the production of retroviral protein antigens. Because expression of the Rous sarcoma virus LTR does not result in retroviral protein production, it would not be expected to induce tolerance.

#### 4. Recombination with fish retroviruses

Possible recombinational events whereby fish retroviruses containing the Rous sarcoma virus LTR are produced are currently unknown. Fish retroviruses have been described in northern pike, walleye pike, and Atlantic salmon (Teich, 1982), but they have not been well characterized. Tumors, caused by fish retroviruses, are found only in sexually mature fish (Teich, 1982). Because these transgenic carp have not reached sexual maturity, tumor potential of these fish is still unknown. Among chickens, spontaneous recombination of exogenous retroviruses with endogenous genes has not been observed, although chickens have many endogenous genes and exogenous retroviral infection is extremely common (H.J. Kung, personal communication). Retroviruses in different species tend to be different in their nucleotide sequences. As recombination between viruses depends on nucleotide homology, the occurrences of recombination between viruses of fish and birds, for example, is unlikely.

In conclusion, there is insufficient evidence to say with certainty that use of Rous sarcoma virus LTR sequences in the genetic modification of the carp will not cause harm to humans or the ecosystem, but available information suggests that significant adverse effects are highly improbable.

#### References:

- Crittenden, L.B., E.J. Smith, and A.M. Fadly. 1984. Influence of Endogenous Viral (ev) Gene Expression and Strain of Exogenous Avian Leukosis Virus (ALV) on Mortality and ALV Infection and Shedding in Chickens. *Avian Dis.* Vol. 28 (4), pp. 1037-1056.
- Hayward, W.S., B.G. Neel, and S.M. Astrin. 1981. Activation of a Cellular *Onc* Gene by Promoter Insertion in ALV-induced Lymphoid Leukosis. *Nature* Vol. 290, pp. 475-480.
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#### Appendix 4—I. Excerpt From NIH Guidelines for Research Involving Recombinant DNA Molecules—Federal Register, 51, 16963, May 7, 1986

##### III-B-4. Recombinant DNA Experiments Involving Whole Animals or Plants

**III-B-4-a.** Recombinant DNA, or RNA molecules derived therefrom, from any source except for greater than two thirds of a eukaryotic viral genome may be transferred to any non-human vertebrate organism and propagated under conditions of physical containment comparable to BL1 and appropriate to the organism under study. It is important that the investigator demonstrate that the fraction of the viral genome being utilized does not lead to productive infection. A USDA permit is required for work with Class 5 agents.

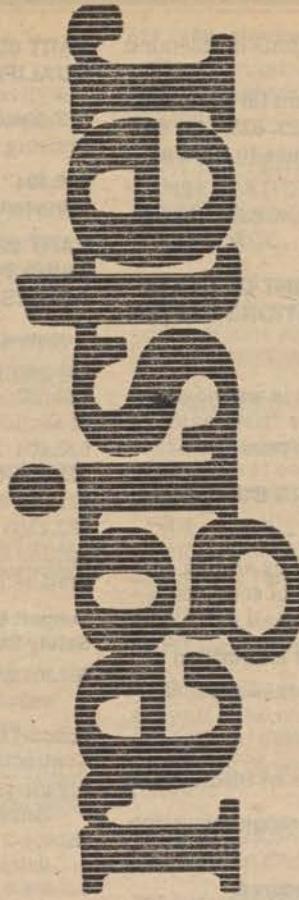
**III-B-4-b.** For all experiments involving whole animals and plants and not covered by Section III-B-4-a, the appropriate containment will be determined by the IBC.

#### II. Excerpt from Recombinant DNA Research; Proposed Actions Under NIH Guidelines, "Appendix Q. Physical and Biological Containment for Recombinant DNA Research Involving Animals," Federal Register, 52, 29800, paragraph 338, August 11, 1987

Other research with nonlaboratory animals that may not appropriately be conducted under conditions described in Appendix Q can be conducted safety [sic] by applying practices routinely used for controlled culture of these biota. In aquatic systems, for example, BL1 equivalent conditions could be met by utilizing growth tanks that provide adequate physical means to avoid the escape of the aquatic species, its gametes, and introduced exogenous genetic material. A mechanism should be provided to ensure that neither the organisms nor their gametes can escape into the supply or discharge system of the rearing container (e.g., tank, aquarium, etc.). Acceptable barriers include appropriate filter, irradiation, heat treatment, chemical treatment, etc. Moreover, the top of the rearing container should be covered to avoid escape of the organism and its gametes. In the event of tank rupture, leakage, or overflow, the construction of the room containing these tanks should prevent the organisms and gametes from entering the building's drains before the organism and its gametes have been inactivated.

[FR Doc. 90-3610 Filed 2-15-90; 8:45 am]

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**Friday**  
**February 16, 1990**

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**Part IV**

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**Department of State**

**48 CFR Parts 601, 605, and 607 et al.  
Acquisition Regulations, Miscellaneous  
Amendments; Final Rule**

**DEPARTMENT OF STATE**

**48 CFR Parts 601, 605, 607, 608, 609, 622, 623, 625, 632, 636, 637, 648, and 653.**

[State Acquisition Circular 88-1]

**Department of State Acquisition Regulation; Miscellaneous Amendments**

**AGENCY:** Department of State.

**ACTION:** Final rule.

**SUMMARY:** State Acquisition Circular (SAC) 88-1, amends the Department of State Acquisition Regulation (DOSAR):

(1) In consideration of some of the changes made to the Federal Acquisition Regulation (FAR) by Federal Acquisition Circulars (FAC's) 84-34 through 84-50;

(2) By designating appropriate officials where the FAR prescribes "agency head" or "agency head or designee."

(3) By revising the authority designation in part 636.

(4) By correcting editorial errors in part 601.

(5) By correcting the table of contents for part 653 by removing section 653.107, which was included in error;

(6) By amending the Table of Contents for part 609 to reflect the revised title of section 609.404 (for FAR 9.404, as included in FAC 84-46);

Items (4), (5), and (6) are considered strictly editorial in nature.

**EFFECTIVE DATES:** February 16, 1990.

**FOR FURTHER INFORMATION CONTACT:** James Tyckoski, Office of the Procurement Executive (703) 875-7046.

**SUPPLEMENTARY INFORMATION:** The changes being made by SAC 88-1 do not constitute "significant revisions" as defined at FAR 1.501-1; therefore, public comment has not been solicited pursuant to FAR 1.501-3(a). This action is exempt from the requirements of Executive Order 12291 by OMB Circular 85-7. It will not have an impact on a substantial number of small entities, nor does it establish any information collection as contemplated by the Regulatory Flexibility Act and Paperwork Reduction Act.

**List of Subjects in 48 CFR 601, 605, 607, 608, 609, 622, 623, 625, 632, 636, 637, 648, and 653**

Government procurement.

Dated: January 23, 1990.

**John J. Conway,**  
*Procurement Executive.*

For the reasons set out in the Preamble, Chapter 6 of Title 48 of the

Code of Federal Regulations is amended as follows:

1. The authority citation for parts 601, 605, 607, 608, 609, 622, 623, 625, 632, 636, 637, 648, and 653 continues to read as follows:

Authority: 22 U.S.C. 2658; 40 U.S.C. 486(c); 48 CFR subpart 1.3.

**PART 601—DEPARTMENT OF STATE ACQUISITION REGULATIONS SYSTEM**

**601.602-1 [Amended]**

2. Section 601.602-1(c) is amended by adding "a contract" after "terminate" and by revising "ben" to read "been".

**PART 605—PUBLICIZING CONTRACT ACTIONS**

4. Part 605 is amended by adding subpart 605.4, consisting of sections 605.404 and 605.404-1 to read as follows:

**Subpart 605.4—Release of Information**

**605.404 Release of long-range acquisition estimates.**

605.404-1 Release procedures.

**Subpart 605.4—Release of Information**

**605.404 Release of long-range acquisition estimates.**

**605.404-1 Release procedures.**

The Procurement Executive is the agency head's designee for the purposes of FAR 5.404-1(a) and the agency head for the purposes of FAR 5.404-1(b).

5. A new part 607 consisting of subpart 607.1 and section 607.103 is added to read as follows:

**PART 607—ACQUISITION PLANNING**

Authority: 22 U.S.C. 2658; 40 U.S.C. 486(c); 48 CFR subpart 1.3.

**Subpart 607.1—Acquisition Plans**

**607.103 Agency-head responsibilities.**

The Procurement Executive is the agency head's designee for the purposes of FAR 7.103.

**PART 608—REQUIRED SOURCES OF SUPPLIES AND SERVICES**

6. Part 608 is amended by adding subpart 608.3 consisting of section 608.302 to read as follows:

**Subpart 608.3—Acquisition of Utility Service**

**608.302 Applicability.**

The Procurement Executive is the agency head for the purposes of FAR 8.302(d)(2)(i).

**PART 609—CONTRACTOR QUALIFICATIONS**

7. Section 609.404 is amended by revising the section heading as follows:

**609.404 Parties excluded from procurement programs.**

**PART 622—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS**

8. Part 622 is amended by adding subpart 622.3, consisting of section 622.302; adding subpart 622.4, consisting of sections 622.404, 622.404-3, 622.404-6, 622.404-7, 622.404-11, 622.406, 622.406-1, 622.406-8, 622.406-9, 622.406-10, 622.406-11, and 622.406-12; adding section 622.1308 to subpart 622.13; and adding section 622.1408 to subpart 622.14 to read as follows:

**Subpart 622.3—Contract Work Hours and Safety Standards Act**

**603.302 Liquidated damages and overtime pay.**

**Subpart 622.4—Labor Standards For Contracts Involving Construction**

**622.404 Davis-Bacon Act wage determinations.**

**622.404-3 Procedures for requesting wage determinations.**

**622.404-6 Modifications of wage determinations.**

**622.404-7 Correction of wage determinations containing clerical errors.**

**622.404-11 Wage determination appeals.**

**622.406 Administration and enforcement.**

**622.406-1 Policy.**

**622.406-8 Investigations.**

**622.406-9 Withholding from or suspension of contract payments.**

**622.406-10 Disposition of disputes concerning construction contract labor standards enforcement.**

**622.406-11 Contract terminations.**

**622.406-12 Cooperation with the Department of Labor.**

**622.1308 Contract clauses.**

**622.1408 Contract clause.**

**622.302 Liquidated damages and overtime pay.**

The authority to make the determination prescribed in FAR 22.302(c) is delegated, without power of redelegation, to the head of the contracting activity.

**622.404 Davis-Bacon Act wage determinations.**

**622.404-3 Procedures for requesting wage determinations.**

The cognizant contracting activity (see 601.603-70) is the contracting agency for the purposes of FAR 22.404-3(b) and (e)

**622.404-6 Modifications of wage determinations.**

The cognizant contracting activity is the contracting agency for the purposes of FAR 22.404-6.

**622.404-7 Correction of wage determinations containing clerical errors.**

The cognizant contracting activity is the contracting agency for the purposes of FAR 22.404-7.

**622.404-11 Wage determination appeals.**

The cognizant contracting activity is the contracting agency for the purposes of FAR 22.404-11.

**622.406 Administration and enforcement.****622.406-1 Policy.**

The cognizant contracting activity is the contracting agency for the purposes of FAR 22.406-1(a).

**622.406-8 Investigations.**

(a) The chief of the contracting activity is responsible for conducting labor standards investigations as prescribed in FAR 22.406-8(a).

(d) The Procurement Executive is the agency head's designee for the purposes of FAR 22.406-8(d).

**622.406-9 Withholding from or suspension of contract payments.**

The authority to suspend contract payments pursuant to FAR 22.406-9(b) is delegated, without power of redelegation, to the head of the contracting activity.

**622.406-10 Disposition of disputes concerning construction contract labor standards enforcement.**

The cognizant contracting activity is the contracting agency for the purposes of FAR 22.406-10(b).

**622.406-11 Contract terminations.**

The cognizant contracting activity is the contracting agency for the purposes of FAR 22.406-11.

**622.406-12 Cooperation with the Department of Labor.**

Any information furnished to the Department of Labor pursuant to FAR 22.406-12(a) shall be submitted through the head of the contracting activity.

**622.1308 Contract clauses.**

The Procurement Executive is the agency head for the purposes of FAR 22.1308 (a)(2) and (c).

**622.1408 Contract clause.**

The Procurement Executive is the agency head for the purposes of FAR 22.1408.

**PART 623—ENVIRONMENT, CONSERVATION, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE**

9. Part 623 is amended by revising the title to read as set forth above and adding a new subpart 623.5, consisting of section 623.506 to read as follows:

**Subpart 623.5—Drug-Free Workplace****623.506 Suspension of payments, termination of contract, and debarment and suspension actions.**

The authority to approve the determination prescribed in FAR 23.506(e) is reserved to the Secretary of State.

**PART 625—FOREIGN ACQUISITION**

10. Part 625 is amended by revising subpart 625.9 consisting of section 625.901 and adding subpart 625.10, consisting of section 625.1003, to read as follows:

**Subpart 625.9—Additional Foreign Acquisition Clauses****625.901 Omission of examination of records clause.**

The Procurement Executive is the agency head for the purposes of FAR 25.901.

**Subpart 625.10—Sanctions for Violations of Export Controls****625.1003 Exceptions.**

The Procurement Executive is the agency head's designee for the purposes of FAR 25.1003(b).

**PART 632—CONTRACT FINANCING**

11. Part 632 is amended by adding subpart 632.9 consisting of section 632.903 to read as follows:

**Subpart 632.9—Prompt Payment****632.903 Policy.**

The authority to make the determination prescribed in FAR 32.903 is delegated, without power of redelegation, to the head of the contracting activity. Before making a determination concerning early invoice and contract financing payments, the head of the contracting activity shall

consult with the Office of Fiscal Operations director, or designee.

**PART 636—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS**

12. Part 636 is amended by revising section 636.602 to read as follows:

**636.602 Selection of firms for architect-engineer contracts.**

The authority to select Architect-Engineers prescribed in FAR 36.602 is delegated, with power to redelegate, to the head of the contracting activity.

**PART 637—SERVICE CONTRACTING**

13. Part 637 is amended by adding section 637.110 in numerical order under subpart 637.1 to read as follows:

**637.110 Solicitation provisions and contract clauses.**

(f) Use of the clause at 52.237-8, Severance Payments to Foreign Nationals Employed Under a Service Contract Performed Outside the United States, is mandatory for DOS solicitations and contracts for services which may be performed in whole or in part outside the United States, and for which cost analysis is performed (see FAR 15.805-3).

**PART 648—VALUE ENGINEERING**

14. Part 648 is amended by revising section 648.102, and adding subpart 648.2 consisting of section 648.201 to read as follows:

**648.102 Policies.**

(a) The authority to grant exemptions prescribed in FAR 48.102(a), or to extend future contract savings or sharing pursuant to FAR 48.102(g), is delegated, without power of redelegation, to the head of the contracting activity (see 601.603-70).

**Subpart 648.2—Contract Clauses****648.201 Clauses for supply or service contracts.**

The authority to determine exemptions prescribed in FAR 48.201(a)(6) is delegated, without power of redelegation, to the head of the contracting activity.

**PART 653—FORMS****653.107 [Removed]**

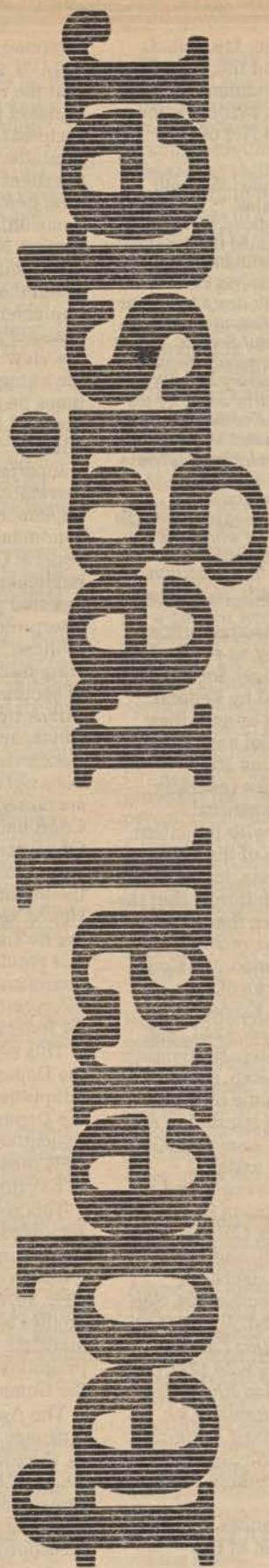
15. Part 653 is amended by removing section 653.107.

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BILLING CODE 4710-24-M



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Friday  
February 16, 1990



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**Part V**

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**Commission on Civil  
Rights**

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**45 CFR Part 707**

**Enforcement of Nondiscrimination on the  
Basis of Handicap in Programs and  
Activities; Final Rule**

**COMMISSION ON CIVIL RIGHTS****45 CFR Part 707****Enforcement of Nondiscrimination on the Basis of Handicap in Programs and Activities Conducted by the U.S. Commission on Civil Rights****AGENCY:** Commission on Civil Rights.**ACTION:** Final rule.

**SUMMARY:** This regulation requires that the U.S. Commission on Civil Rights (Agency) operate all of its programs and activities to ensure nondiscrimination against qualified individuals with handicaps. It sets forth standards for what constitutes discrimination on the basis of mental or physical handicap, provides a definition of an individual with handicaps and a qualified individual with handicaps, and establishes a complaint mechanism for resolving allegations of discrimination. This regulation is issued under the authority of section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of handicap in programs conducted by the Agency.

**EFFECTIVE DATE:** This regulation shall become effective March 28, 1990.

**ADDRESSES:** Copies of this regulation are available on tape for those with impaired vision or other physical handicaps. They may be obtained through the Office of the General Counsel, U.S. Commission on Civil Rights, 1121 Vermont Avenue, NW., Washington, DC 20425.

**FOR FURTHER INFORMATION CONTACT:**

Jeffrey P. O'Connell, Acting Solicitor, (202) 376-8514, TDD (202) 376-8116.

**SUPPLEMENTARY INFORMATION:****Background**

On June 16, 1988, the Agency published a Notice of Proposed Rulemaking (NPRM). 53 FR 22554. The close of the comment period was August 16, 1988. The Agency received comments from four commenters. Copies of these comments will be available in the Robert S. Rankin National Civil Rights Library of the U.S. Civil Rights Commission, Room 709, 1121 Vermont Avenue NW., Washington, DC 20425 until this regulation is effective.

The purpose of this regulation is to provide for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), as it applies to programs and activities conducted by the Agency.

As amended by the Rehabilitation, Comprehensive Services, and Developmental Disabilities

Amendments of 1978 (sec. 119, Pub. L. 95-602, 92 Stat. 2982), and the Rehabilitation Act Amendments of 1986 (Pub. L. 99-506, 100 Stat. 1810), section 504 of the Rehabilitation Act of 1973 states that:

No otherwise qualified individual with handicaps in the United States, \* \* \* shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(29 U.S.C. 794) (1978 amendment italicized).

The substantive nondiscrimination obligations of the Agency as set forth in this regulation are identical, for the most part, to those established by Federal regulations for programs or activities receiving Federal financial assistance. See 28 CFR Part 41 (section 504 coordination regulation for federally assisted programs). This general parallelism is in accord with the intent expressed by supporters of the 1978 amendment in floor debate, including its sponsor, Rep. James M. Jeffords, that the Federal Government have the same section 504 obligations as recipients of Federal financial assistance. 124 Cong. Rec. 13,901 (1978) (remarks of Rep. Jeffords); 124 Cong. Rec. E2668, E2670 (daily ed. May 17, 1978) *id.*; 124 Cong. Rec. 13,897 (remarks of Rep. Brademas); *id.* at 38,552 (remarks of Rep. Sarasin).

There are, however, some language differences between this regulation and the Federal Government's section 504 regulations for federally assisted programs. These changes are based on the Supreme Court's decision in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), and the subsequent circuit court decisions interpreting *Davis* and section 504. See *Dopico v. Goldschmidt*, 687 F.2d 644 (2d Cir. 1982); *American Public Transit Association v. Lewis*, 655 F.2d 1272 (D.C. Cir. 1981) (APTA); see also *Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority*, 718 F.2d 490 (1st Cir. 1983); *Strathie v. Department of Transportation*, 716 F.2d 227 (3rd Cir. 1983).

These language differences are also supported by the decision of the

Supreme Court in *Alexander v. Choate*, 469 U.S. 287 (1985), where the Court held that the regulations for federally assisted programs did not require a recipient to modify its duration limitation on Medicaid coverage of inpatient hospital care for individuals with handicaps. Clarifying its *Davis* decision, the Court explained that section 504 requires only "reasonable" modification, *id.* at 300, and explicitly noted that "[t]he regulations implementing section 504 (for federally assisted programs) are consistent with the view that reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access." *Id.* at 301 n. 21 (emphasis added).

Incorporation of these changes, therefore, makes this regulation implementing section 504 for federally conducted programs consistent with the Federal Government's regulations implementing section 504 for federally assisted programs, as they have been interpreted by the Supreme Court. Many of these federally assisted regulations were issued prior to the interpretations of section 504 by the Supreme Court in *Davis*, by lower courts interpreting *Davis*, and by the Supreme Court in *Alexander*; therefore, their language does not reflect the interpretation of section 504 provided by the Supreme Court and by the various circuit courts. Of course, the federally assisted regulations must be interpreted to reflect the holdings of the Federal judiciary. Hence, the Agency believes that there are no significant differences between this regulation for federally conducted programs and the Federal Government's interpretation of section 504 regulations for federally assisted programs.

This regulation has been reviewed by the Department of Justice. It is an adaptation of a prototype prepared by the Department of Justice under Executive Order 12250 (45 FR 72995, 3 CFR, 1980 Comp., p. 298) and distributed to Executive agencies.

This regulation has also been reviewed by the Equal Employment Opportunity Commission (EEOC) under Executive Order 12067 (43 FR 28967, 3 CFR, 1978 Comp., p. 206). This regulation applies section 504's nondiscrimination mandate to the specific types of programs and activities conducted by the Commission.

The Agency has incorporated language suggested to Federal agencies by the EEOC in its letter dated October 19, 1983, to clarify the prototype provisions regarding employment discrimination. The substitute wording incorporates the definitions,

requirements, and procedures promulgated by the EEOC under section 501 of the Rehabilitation Act to apply to Federal employment discrimination under section 504.

This regulation is not a major rule within the meaning of Executive Order No. 12291 (46 FR 13193, 3 CFR, 1981 Comp., p. 127) and, therefore, a regulatory impact analysis has not been prepared. This regulation does not have an impact on small entities. It is not, therefore, subject to the Regulatory Flexibility Act (5 U.S.C. 601-612).

#### Section-by-Section Analysis and Response to Comments:

One commenter maintained that Executive Order No. 12612, issued October 26, 1987, requires a Federal agency to include a report on the impact of its regulations upon State governmental programs and procedures. Executive Order No. 12612 deals with federalism and indicates that Federal action limiting the policymaking discretion of the States should be taken only where constitutional authority for the action is clear and certain, and the national activity is necessitated by the presence of a problem of national scope. This regulation involves limitations on the operation of Federal agencies pursuant to Federal law; it has insufficient federalism implications to warrant such an impact report. In any event, an impact report, if it were required, would be delivered to the Office of Management and Budget and would not be published in the *Federal Register*.

#### Section 707.1 Purpose

Section 707.1 states the purpose of this regulation, which is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

#### Section 707.2 Application

This regulation applies to all programs or activities conducted by the Agency, including activities of the Agency's State Advisory Committees.

#### Section 707.3 Definitions

Most of the comments on this section concern the definition of "auxiliary aids" and "qualified individuals with handicaps."

(a) *"Agency."* For purposes of this regulation, "Agency" means the U.S.

Commission on Civil Rights and its State Advisory Committees.

(b) *"Auxiliary aids."* "Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in and enjoy the benefits of the Agency's programs or activities. The definition provides examples of commonly used auxiliary aids. Although auxiliary aids are required explicitly only by § 707.10, they may also be necessary to meet other requirements of this regulation.

One comment requested the definition of "auxiliary aids" be expanded. The items set out in § 707.2(b) are clearly described as examples, and do not constitute an exhaustive list.

Another comment requested that the definition include attendant services for the severely disabled to assist them during the workday and to aid in commutation to and from work. As a general rule, the services of an attendant for a person with a disability are viewed as personal in nature and not directly related to the Agency's programs or activities. In certain instances, the services of attendants may be appropriate; in those instances, they will be covered under the existing regulation. For example, an attendant might be provided for Federal employees or other persons traveling for the Agency. Where a person with a disability who is unable to travel without an attendant is required to perform official travel, the traveling expenses of an attendant, including per diem and transportation expenses, may be paid by the Agency. See 5 U.S.C. 3102(d).

One commenter recommended that the definition of "auxiliary aids" be renamed "aids for reasonable accommodation." This comment has not been adopted. The term "auxiliary aids" is a term of art in the Federal regulations. Revising the term would give rise to speculation that a different meaning is intended when, in fact, it is not.

(c) *"Complete complaint."* "Complete complaint" is defined to include all the information necessary to enable the Agency to investigate the complaint. The definition is necessary, because the 180-day period for the Agency's investigation (see § 707.12(d)), begins when it receives a complete complaint.

(d) *"Facility."* The definition of "facility" is similar to that in the section 504 coordination regulation for federally assisted programs, 28 CFR 41.3(f). The definition includes vehicles rather "rolling stock" as used in the prototype because the Agency does not have any rolling stock.

(e) *"Individual with handicaps."* The definition of "individual with handicaps" is identical to the definition of "handicapped person" appearing in the section 504 coordination regulation for federally assisted programs, 28 CFR 41.31. Although section 103(d) of the Rehabilitation Act Amendments of 1986 changed the statutory term "handicapped individual" to "individual with handicaps," the legislative history of this amendment indicates that no substantive change was intended. Thus, although the term has been changed in this regulation to be consistent with the statute as amended, the definition is unchanged. In particular, although the term, as revised, refers to "handicaps" in the plural, it does not exclude persons who have only one handicap.

One commenter proposed that "sensory" be added to the phrase "physical or mental impairment." Since the definition specifically includes the sense organs among the body systems the impairment of which constitutes a handicap, it is unnecessary to amend this regulation.

(f) *"Qualified individual with handicaps."* The definition of "qualified individual with handicaps" is a revised version of the definition of "qualified handicapped person" appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.32). With respect to Agency employment practices, this regulation incorporates the definition of "qualified individual with handicaps" contained in the EEOC's regulation (29 CFR part 1613) implementing section 501 of the Rehabilitation Act, as amended. Nothing in this part changes existing regulations applicable to employment.

For other purposes, the definition of "qualified individual with handicaps" has two parts. Paragraph (1) deviates from existing regulations for federally assisted programs because of intervening court decisions. It defines "qualified individual with handicaps" with regard to any program under which a person is required to perform services or to achieve a level of accomplishment. In such programs, a qualified individual with handicaps is one who can achieve the purpose of the program without modifications in the program that the Agency can demonstrate would result in a fundamental alteration in its nature.

This definition reflects the decision of the Supreme Court in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). In that case, the Court ruled that a hearing-impaired applicant to a nursing school was not a "qualified individual with handicaps" because her hearing impairment would prevent her

from participating in the clinical training portion of the program. The Court found that if the program were modified so as to enable the respondent to participate (by exempting her from the clinical training requirements), "she would not receive even a rough equivalent of the training a nursing program normally gives." *Id.* at 410. It also found that "the purpose of (the) program was to train persons who could serve the nursing profession in all customary ways," *id.* at 413, and that the respondent would be unable, because of her hearing impairment, to perform some functions expected of a registered nurse. It therefore concluded that the school was not required by section 504 to make such modifications that would result in "a fundamental alteration in the nature of the program." *Id.* at 410.

The Agency has incorporated the Court's language in the definition of "qualified individual with handicaps" in order to make clear that such a person must be able to participate in the program offered by the Agency. The Agency is required to make modifications in order to enable an applicant with handicaps to participate, but is not required to offer a program of a fundamentally different nature. The test is whether, with appropriate modifications, the applicant can achieve the purpose of the program offered, not whether the applicant could benefit or obtain results from some other program that the Agency does not offer. Although the revised definition allows exclusion of some individuals with handicaps from some programs, it requires that an individual with handicaps who is capable of achieving the purpose of the program must be accommodated, provided that the modifications do not fundamentally alter the nature of the program.

The Agency has the burden of demonstrating that a proposed modification would constitute a fundamental alteration in the nature of its program or activity. Furthermore, in demonstrating that a modification would result in such an alteration, the Agency must follow the procedures established in § 707.8(b)(2)(ii), § 707.8(c) and § 707.9(e), which are discussed below, for demonstrating that an action would result in undue financial and administrative burdens. That is, the decision must be made by the Staff Director or his or her designee in writing after consideration of all resources available for the program or activity and must be accompanied by an explanation of the reasons for the decision. If the Staff Director determines that an action would result in a fundamental

alteration, the Agency must consider options that would enable the individual with handicaps to achieve the purpose of the program, but would not result in such an alteration.

A commenter felt that the Commission's incorporation of the *Davis* and *Alexander* cases into this regulation was unduly restrictive and would produce a less demanding result than found in the federally assisted program regulations. The application of *Davis*, *Alexander* and subsequent cases, in the Agency's opinion, reflects the proper interpretation of section 504. It is necessary, therefore, to include these interpretations in this regulation.

Another commenter believed that the fundamental alteration test in *Davis* is applicable only to education programs. The Agency finds no basis for this comment. *Alexander*, *APTA* and *Strathie*, mentioned above, are not decisions based upon an academic program, but each cites *Davis* as authority for its result. One commenter suggested that a fundamental alteration test would encompass an overly broad list of modifications. This view, however, confuses any alteration or change with the well-documented fundamental alteration standard used in section 504 cases and regulations.

Paragraph (3) of the definition of qualified individual with handicaps adopts the existing definition of "qualified individual with handicaps" with respect to services (28 CFR 41.32(b)) in the coordination regulation for programs receiving Federal financial assistance. Under this definition, a qualified individual with handicaps is an individual with handicaps who meets the essential eligibility requirements for participation in the program or activity. This definition applies to the many Agency activities, such as hearings, open meetings, and press conferences, that are intended to be open to the public and for which there are not explicit eligibility or selection criteria for attendance.

Paragraph (2) has been included to make clear that "qualified individual with handicaps" is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by § 707.7. Nothing in this part changes existing regulations applicable to employment.

(g) "Section 504." This definition makes clear that, as used in this regulation, "section 504" applies only to programs or activities conducted by the Agency. The Agency does not have authority to operate programs and activities providing Federal financial assistance to outside recipients.

#### Section 707.4 Self-Evaluation and Remedial Measures

The Agency shall conduct a self-evaluation of its compliance with section 504 within one year of the effective date of this regulation. The self-evaluation requirement is present in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance. (28 CFR 41.5(b)(2)). Experience under that requirement has demonstrated the self-evaluation process to be a valuable means for establishing a working relationship with individuals with handicaps that promotes effective and efficient implementation of section 504.

A commenter proposed that material available for public inspection after a self-evaluation include a list of all individuals consulted. Other comments requested an "assurance" by the Agency that the effect of any discriminatory policy will be eliminated, a transition plan for compliance, and specific modification requirements for impaired vision or hearing. Another comment proposed that the Agency state that the modifications will occur "forthwith." Federally assisted program regulations do provide for assurances. For regulations dealing with grants to non-Federal entities, such assurances are appropriate and can be specifically enforced. Under this regulation, all programs and benefits are under the control of the Staff Director, who does not have to rely upon specific contractual provisions with grantees in ensuring the enforcement of the law. Instead, the Staff Director has the authority to issue the appropriate directives to remedy any problems. The need for specific contractual provisions, as originally established in the federally assisted regulations, does not exist in the context of federally conducted programs. Requirements for specific modifications, timeframes for compliance, and a transition plan are covered by other parts of the regulation. See §§ 707.8(b)(4) and (5) and 707.9.

#### Section 707.5 Notice

Section 707.5 requires the Agency to disseminate sufficient information to employees, applicants, and other interested persons, as appropriate, to apprise them of rights and protections afforded by section 504 and this regulation. Methods of providing this information include, for example, the publication of information in handbooks, manuals, and pamphlets that are distributed to the public to describe the Agency's programs and activities; the display of informative

posters in service centers and other public places; or the broadcast of information by television or radio.

This section also contains the general notice provisions located in the prototype in the Communications section (160). These requirements are located in this section to consolidate all provisions relating to notice requirements in one section. Paragraphs (b) and (c) require that interested persons be able to obtain information about accessible services, activities, and facilities, and that they be provided with information about their section 504 rights.

In connection with § 707.4, one comment urged that adequate provision be made to ensure that Agency policy on nondiscrimination be available in recruitment material and other information. The Notice provision of § 707.5, which has been modified for clarity, already provides for the dissemination of this information.

#### *Section 707.6 General Prohibitions Against Discrimination*

Section 707.6 is an adaptation of the corresponding section of the section 504 coordination regulation for programs or activities receiving Federal financial assistance [28 CFR 41.51].

Paragraph (a) restates the nondiscrimination mandate of section 504. The remaining paragraphs in § 707.6 establish the general principles for analyzing whether any particular action of the Agency violates this mandate. These principles serve as the analytical foundation for the remaining sections of this regulation. Whenever the Agency has violated a provision in any of the subsequent sections, it has also violated one of the general prohibitions found in § 707.6. When there is no applicable subsequent provision, the general prohibitions stated in this section apply.

Paragraph (b) prohibits overt denials of equal treatment of individuals with handicaps. The Agency may not refuse to provide an individual with handicaps with an equal opportunity to participate in or benefit from its program simply because the person is handicapped. Such blatantly exclusionary practices often result from the use of irrefutable presumptions that absolutely exclude certain classes of disabled persons (e.g., people with epilepsy, a hearing impairment, or a heart ailment) from participation in programs or activities without regard to an individual's actual ability to participate. Use of an irrefutable presumption is permissible only in the very limited situations discussed in § 707.11.

Section 504, however, prohibits more than just the most obvious denials of

equal treatment. It is not enough to admit persons in wheelchairs to a program if the facilities in which the program is conducted are inaccessible. Paragraph (b)(1)(iii), therefore, requires that the opportunity to participate or benefit afforded to an individual with handicaps be as effective as that afforded to others. The later sections on physical access (§ 707.8) and access to communications (§ 707.9) are specific applications of this principle.

Despite the mandate of paragraph (d) that the Agency administer its programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps, paragraph (b)(1)(iv), in conjunction with paragraph (d), permits the Agency to develop separate or different aids, benefits, or services when necessary to provide individuals with handicaps with an equal opportunity to participate in or benefit from the Agency's programs or activities. Paragraph (b)(1)(iv) requires that different or separate aids, benefits, or services be provided only when necessary to ensure that the aids, benefits, or services are as effective as those provided to others. Even when separate or different aids, benefits, or services would be more effective, paragraph (b)(2) provides that a qualified individual with handicaps still has the right to choose to participate in the program that is not designed to accommodate individuals with handicaps.

Paragraph (b)(1)(v) prohibits the Agency from denying a qualified individual with handicaps the opportunity to participate as a member of a planning or advisory board or committee.

Paragraph (b)(1)(vi) prohibits the Agency from limiting a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, or service.

Paragraph (b)(3) prohibits the Agency from utilizing criteria or methods of administration that deny individuals with handicaps access to the Agency's programs or activities. The phrase "criteria or methods of administration" refers to official written Agency policies and the actual practices of the Agency. This paragraph prohibits both blatantly exclusionary policies or practices and nonessential policies and practices that are neutral on their face, but deny individuals with handicaps an effective opportunity to participate. Discriminatory qualifications and selection criteria are addressed more specifically in § 707.11. Paragraph (b)(3)(ii) specifically prohibits the

Agency from defeating or substantially impairing the accomplishment of the objectives of a program or activity with respect to individuals with handicaps. This section appears in existing section 504 regulations for federally assisted programs. (See, e.g., 28 CFR 41.51(b)(3)(ii).)

Paragraph (b)(4) specifically applies the prohibition enunciated in § 707.6(b)(3) to the process of selecting sites for hearing or other activities, or for the construction of new facilities to be used by the Agency. Paragraph (b)(4) does not apply to construction of additional buildings at an existing site.

Paragraph (b)(5) prohibits the Agency in the selection of procurement contractors from using criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

A commenter proposed that this provision be revised so that it require the Agency to use selection criteria in the choice of procurement contractors to ensure that individuals with handicaps are not discriminated against by the contractor. This proposal was not accepted. The subsection addresses a different problem than the comment. The protection afforded by this subsection is to ensure that the Agency does not discriminate against a contractor because of disabilities. It does not deal with the issue of discrimination by contractors and does not extend section 504 directly to the programs or activities of contractors themselves.

Paragraph (c) provides that programs conducted pursuant to Federal statute or Executive order that are designed to benefit only individuals with handicaps or a given class of individuals with handicaps may be limited to those individuals with handicaps.

One commenter suggested that the reference to an Executive order in this paragraph be deleted because Federal law cannot be unilaterally modified by an Executive order. While an Executive order in such an instance could not revise statutory law, it would have no such effect in these circumstances. An Executive order is used to implement the law or to take action not inconsistent with the law. A program especially designed to benefit only individuals with handicaps would not produce discrimination barred by section 504. Indeed, such a program may be important in ensuring that individuals receive appropriate assistance. Any such program, of course, does not limit the ability of individuals with handicaps to participate in other programs.

Paragraph (d) provides that the Agency must administer its programs and activities in the most integrated setting which is appropriate to the needs of qualified individuals with handicaps, i.e., in a setting that enables individuals with handicaps to interact with nonhandicapped persons to the fullest extent possible.

#### Section 707.7 Employment

Section 707.7 prohibits discrimination on the basis of handicap in employment by the Agency. Courts have held that section 504, as amended in 1978, covers the employment practices of Executive agencies. *Gardner v. Morris*, 752 F.2d 1271, 1277 (9th Cir. 1985); *Smith v. United States Postal Service*, 742 F.2d 257, 259-60 (6th Cir. 1984); *Prewitt v. United States Postal Service*, 662 F.2d 292, 302-04 (5th Cir. 1981). *Contra McGuiness v. United States Postal Service*, 744 F.2d 1318, 1320-21 (7th Cir. 1984); *Boyd v. United States Postal Service*, 752 F.2d 410, 413-14 (9th Cir. 1985).

Courts uniformly have held that, in order to give effect to section 501 of the Rehabilitation Act, which covers Federal employment, the administrative procedures of section 501 must be followed in processing complaints of employment discrimination under section 504. *Smith*, 742 F.2d at 262; *Prewitt*, 662 F.2d at 304.

Accordingly, § 707.7 (Employment) of this regulation adopts the definitions, requirements, and procedures of section 501, as established in the EEOC regulations at 29 CFR part 1613. Responsibility for coordinating enforcement of Federal laws prohibiting discrimination in employment is assigned to the EEOC by Executive Order 12067 (3 CFR 1978 Comp., p. 206). Under this authority, the EEOC established Government-wide standards on nondiscrimination in employment on the basis of handicap. In addition to this section, § 707.12(b) specifies that the Agency will use the existing EEOC procedures to resolve allegations of employment discrimination.

#### Section 707.8 Physical Access

This section includes the general nondiscrimination principle (paragraph (a)) underlying the accessibility requirements for existing facilities (paragraph (b)), for new purchases, leases or other arrangements (paragraph (c)), and for new construction and alterations (paragraph (d)). With respect to existing facilities, defined by paragraph (b)(1) to be those owned, leased or used through some other arrangement by the Agency on March 28, 1990, this regulation adopts the

program accessibility concept found in the existing section 504 coordination regulations for programs or activities receiving Federal financial assistance (28 CFR 41.56-58), with certain modifications. Thus § 707.8(b) requires that each Agency program or activity, when viewed in its entirety, be readily accessible to and usable by individuals with handicaps. This regulation also makes clear that the Agency is not required to make each of its existing facilities accessible (§ 707.8(b)(2)). However, § 707.8, unlike 28 CFR 41.56-57, places explicit limits on the Agency's obligation to ensure program accessibility. (§ 707.8(b)(2)).

A commenter opposed the provision exempting buildings leased or owned by the Agency on the effective date of this regulation from the accessibility requirements for newly acquired or newly constructed facilities on the grounds that the delay in implementation of this regulation is excessive. Under the circumstances of section 504 and its implementation, no basis for this comment exists. Moreover, the cost associated with any such changes, particularly if the remaining term of the lease is relatively short, can make alterations unacceptably expensive under the circumstances. Additionally, alterations in the physical structure of a leased facility may be limited by the lease or subject to approval by the lessor. Also, the commenter may not fully comprehend the scope of the program accessibility standard which remains in effect even if the accessibility standard for newly acquired or newly constructed facilities may be inapplicable. The Agency, accordingly, would act, in conformity with paragraph (a), to open participation in a program or benefit to the fullest extent possible.

Paragraph (b)(2)(ii) generally codifies recent case law that defines the scope of the Agency's obligation to ensure program accessibility. This paragraph provides that in meeting the program accessibility requirement the Agency is not required to take any action that would result in a fundamental alteration in the nature of its program or activity or in undue financial and administrative burdens. A similar limitation is provided in § 707.8(c), regarding new purchases, leases or other arrangements, and in § 707.9(e), regarding access to communications. This provision is based on the Supreme Court's holding in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), that section 504 does not require program modifications that result in a fundamental alteration in the nature of a program, and on the Court's statement

that section 504 does not require modifications that would result in "undue financial and administrative burdens." 442 U.S. 412. Since *Davis*, circuit courts have applied this limitation on a showing that only one of the two "undue burdens" would be created as a result of the modification sought to be imposed under section 504. See, e.g., *Dopico v. Goldschmidt*, 687 F.2d 644 (2d Cir. 1982); *American Public Transit Association v. Lewis (APTA)*, 655 F.2d 1272 (D.C. Cir. 1981).

This interpretation is also supported by the Supreme Court's decision in *Alexander v. Choate*, 469 U.S. 287 (1985). *Alexander* involved a challenge to the State of Tennessee's reduction of inpatient hospital care coverage under Medicaid from 20 to 14 days per year. Plaintiffs argued that this reduction violated section 504 because it had an adverse impact on individuals with handicaps. The Court assumed without deciding that section 504 reaches at least some conduct that has an unjustifiable disparate impact on individuals with handicaps, but held that the reduction was not "the sort of disparate impact discrimination" that might be prohibited by section 504 or its implementing regulation. *Id.* at 299.

Relying on *Davis*, the Court said that section 504 guarantees qualified individuals with handicaps "meaningful access to the benefits that the grantee offers," *id.* at 301, and that "reasonable adjustments" in the nature of the benefit being offered must at times be made to assure meaningful access." *Id.* at n. 21 (emphasis added). However, section 504 does not require "changes," "adjustments," or "modifications" to existing programs that would be "substantial" \* \* \* or that would constitute "fundamental alteration(s) in the nature of a program." *Id.* at n. 20 (citations omitted). *Alexander* supports the position, based on *Davis* and the earlier, lower court decisions, that in some situations certain modifications for an individuals with handicaps may so alter an agency's program or activity, or entail such extensive costs and administrative burdens, that the refusal to undertake the accommodations is not discriminatory. Thus, failure to include such an "undue burdens" provision could lead to judicial invalidation of the regulation or reversal of a particular enforcement action taken pursuant to the regulation.

This paragraph, however, does not establish an absolute defense; it does not relieve the Agency of all obligations to individuals with handicaps. Although the Agency is not required to take actions that would result in a

fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens, it nevertheless must take any other steps necessary to ensure that individuals with handicaps receive the benefits and services of the federally conducted program or activity.

It is our view that compliance with paragraphs (b) or (c) of § 707.8 would in most cases not result in undue financial and administrative burdens on the Agency. In determining whether financial and administrative burdens are undue, all agency resources available for use in the funding and operation of conducted program or activity should be considered. The burden of proving that compliance with paragraphs (b) or (c) of § 707.8 would fundamentally alter the nature of a program or activity or would result in undue financial and administrative burdens rests with the Agency. The decision that compliance would result in such alteration or burdens must be made by the Staff Director or his or her designee and must be accompanied by a written statement of the reasons for reaching that conclusion. Any person who believes that he or she or any specific class of persons has been injured by the Staff Director's decision or failure to make a decision may file a complaint under the compliance procedures established in § 707.12.

One commenter objected that the "undue financial or administrative burdens" test, while appropriate for non-Federal recipients, including state agencies, under federally assisted regulations, is inappropriate for federally conducted regulations. The commenter noted that no financial or administrative burden is undue if it permits the individual to peacefully petition the government. For the reasons discussed above, the cases clearly demonstrate the limitations of section 504 standards, and these limitations apply to all entities. For this purpose, there is no distinction between Federal agencies, state agencies, and private entities. The concern that an individual is able to address the Agency is valid, and the Agency does, and will continue to, provide alternate means for citizens to petition it.

A commenter objected to the negative wording of the first paragraph of § 707.8(b)(2), arguing that it may reflect a misreading of *Grove City College v. Bell*, 465 U.S. 555 (1984), and recommended its deletion. The rationale of the commenter is ambiguous. The commenter noted that the *Grove City* decision was based on a title IX, not a section 504, case, and expressed the

view that all Federal programs must be accessible to individuals with handicaps. The concept of § 707.8(b)(2) is similar to that in the section 504 regulations for federally assisted programs. The language in the regulation is appropriate to clarify that, while every facility in which a Federal program or activity is conducted need not be accessible, each program or activity, when viewed as a whole, must be accessible.

Paragraph (b)(3) sets forth a number of means by which program accessibility may be achieved, including redesign of equipment, reassignment of services to accessible buildings, and provision of aides. In choosing among methods, the Agency shall give priority consideration to those that will provide services in the most integrated setting appropriate to the needs of individuals with handicaps. Structural changes in existing facilities are required only when there is no other feasible way to make the Agency's program accessible. It should be noted that "structural changes" include all physical changes to a facility; the term does not refer only to changes to structural features, such as removal of or alterations to a load-bearing structural member. Paragraph (b)(3)(ii) makes clear that while the Agency is not necessarily required to make structural changes, any structural changes it does make shall comply with the Architectural Barriers Act of 1968, as amended (41 U.S.C. 4151-4157) (Barriers Act), and its implementing regulations.

Paragraphs (b)(4) and (b)(5) establish time periods for complying with the program accessibility requirement. As currently required for federally assisted programs by 28 CFR 41.57(b), the Agency must make any necessary structural changes in facilities as soon as practicable, but in no event later than 3 years after the effective date of this regulation. Where structural modifications are required, a transition plan shall be developed within 6 months of the effective date of this regulation. Aside from structural changes, all other necessary steps within the Agency's control to achieve compliance shall be taken within 60 days.

Paragraph (c) specifies the requirement that whenever the Agency acquires an already constructed facility after the effective date of this regulation, that facility must be readily accessible to and usable by individuals with handicaps. This requirement applies to the many facilities the U.S. Commission on Civil Rights leases for hearings, consultations, and State Advisory Committee meetings, and applies regardless of the manner in which the

Agency acquires the facility—whether through lease, purchase, loan, or any other arrangement. Paragraph (c) contains an "undue burdens" defense that is identical to the one found in § 707.8(b)(2)(ii).

Paragraph (c) produces a change from the regulations published thus far by other Executive agencies. Under similar regulations of other agencies, only newly constructed or leased buildings acquired after the effective date of the regulation would result in an agency being required to make the building accessible. The Agency, however, requires that all newly leased, purchased, or otherwise acquired buildings, regardless of when the buildings were constructed, conform to the building accessibility requirements.

One commenter questions the use of the undue burdens test in paragraph (c)(2), raising a concern that the Agency could take into consideration its limited budget and therefore authorize the acquisition of a facility which is not readily accessible. If this were permissible under the section, it would serve to circumvent the express concern that facilities acquired after the effective date of this regulation be readily accessible. The undue burdens test is necessary, however, in light of the Agency's frequent rental of facilities in many towns. The Agency may find it difficult to rent facilities that are fully accessible. Because the Agency's purpose may be served on occasion only by holding hearings, forums, or other public meetings in many towns, including small towns with limited facilities, the undue burdens test is necessary. The Agency understands that it is required to make every effort to find accessible facilities. The Agency would find it a violation of the provision if it attempted to purchase or lease its offices in buildings that were not readily accessible.

One commenter indicated that the accessibility standards of § 707.8(c) should also apply to lease renewals. As noted before, § 707.8(c) is a change from the regulations of other agencies. Imposing potential additional capital costs for lease renewals would be an unrealistic mandatory provision. The Agency continues to adhere to the position that it will do all that it can to ensure that the accessibility standards will be maintained.

One comment congratulated the agency on having high level officials involved in the review of denials of reasonable accommodation requests, but considered it appropriate for a procedure to notify the individual of review rights. The notice provisions of

§ 707.5 already provide that the Agency provide notice to personnel of their rights. Additional language would be surplusage.

Paragraph (d), New Construction and Alterations, specifies the requirements applicable to facilities which the Agency causes to be constructed or altered. Overlapping coverage exists with respect to new construction under section 504 and the Barriers Act. Section 707.8(d) provides that those buildings that are constructed or altered by, on behalf of, or for the use of the Agency shall be designed, constructed, or altered to be readily accessible to, and usable, by individuals with handicaps in accordance with the Barriers Act, as implemented by 41 CFR 101-19.600 to 101-19.607. The Agency adopts the existing Barriers Act standard for section 504 compliance because new and altered buildings subject to this regulation are also subject to the Barriers Act and because adoption of the standard will avoid duplicative and possibly inconsistent standards.

#### *Section 707.9 Access to Communications*

The concept of communication accessibility, contained in the prototype, but not found in the section 504 Federal financial assistance coordination regulation, is particularly important to the ability of the Agency to fulfill its mandate. The Agency's mandate includes acting as a national clearinghouse on civil rights issues (Pub. L. 98-183, section 5(a)(4), 97 Stat. 1301), studying and collecting information concerning civil rights legal development (id., section 5(a)(2)), appraising the civil rights efforts of the Federal Government (id., section 5(a)(3)), and informing Congress and the President of the Agency's findings and recommendations (id., section 5(c)). Because the Agency's essential mission is to provide and disseminate information, it is especially important that the agency act to eliminate communications barriers.

Paragraph (a) contains a general prohibition against discrimination in communications which is parallel to the general prohibition found in the physical access section § 707.8(a)]. Paragraph (b) requires the Agency to take appropriate steps to ensure effective communication. Succeeding paragraphs contain requirements to implement the general prohibition and identify some specific steps which the Agency is required to take. The identification in succeeding paragraphs of steps which the Agency must take does not imply that other steps are not required by those more general provisions. For example, if the

Agency provides phones for public use (such as pay phones in the lobby of a building), it is required to direct telephone service providers to provide at least one telephone equipped with a handset amplifier and compatible with hearing aids.

One commenter requested a revision in paragraph (b) to clarify that the Agency will act to ensure effective communication with employees and applicants. Section 707.7 provides that the requirements of the Equal Employment Opportunity Commission's regulation prohibiting discrimination on the basis of handicap pursuant to section 501 of the Rehabilitation Act apply to employment covered by this regulation. In order to avoid unnecessary duplication of those requirements, references to employment elsewhere in this regulation have been avoided.

Paragraph (c) requires that oral communications, whether by telephone or in person, be made available in an alternate mode. At least one reliably answered telecommunication device for deaf persons (TDD) is required at headquarters and in each regional office, as is wide dissemination of the TDD number. Paragraph (c)(2) requires the establishment of a system through which the Agency can provide interpreters on reasonable notice of the need for them and also requires that the availability of interpreter service be made known. The regulation does not require that the agency have an interpreter on staff. Rather, the agency must be able to provide the interpreter(s) after a qualified individual with handicaps notifies the Agency of the need for an interpreter.

Paragraph (d) requires that written communications be made available in alternate modes. Like the paragraph on the system to enable the Agency to provide an interpreter when the need arises, this paragraph requires that the agency establish a system by which it can meet the need for alternate forms of printed matter when the need arises. Notice is required to be given that reader or taping service is available.

Paragraph (e) contains a provision which, like that in the physical access section, states that the Agency is not required to take any action that it can demonstrate would result in a fundamental alteration in the nature of the Agency's programs or activities or undue financial and administrative burdens. It is our view, however, that compliance with §§ 707.9 and 707.10 would in most cases not result in undue financial and administrative burdens on the Agency. In determining whether

financial and administrative burdens are undue, all Agency resources available for use in the funding and operation of the conducted program or activity should be considered. The burden of providing that compliance with §§ 707.9 and 707.10 would fundamentally alter the nature of a program or activity or would result in undue financial and administrative burdens rests with the Agency. The decision that compliance would result in such alteration or burdens must be made by the Staff Director or his or her designee and must be accompanied by a written statement of the reasons for reaching that conclusion. Any person who believes that he or she or any specific class of persons has been injured by the Staff Director's decision or failure to make a decision may file a complaint under the compliance procedures established in § 707.12.

One commenter would require that the Agency consider its total resources rather than "all agency resources available for use in the funding and operation of" the program or activity. The broadened text suggested by the commenter would be impractical to implement. Some Agency resources are earmarked for specific programs and are not available. As importantly, the Agency's special requirements and budget process make an "Agency resources" test unrealistic. Initial decisions on budget allocation, of course, will be based upon the understanding of the Agency's responsibility in complying with this regulation.

A commenter objected, on grounds similar to a comment on § 707.8, to the fundamental alteration and undue burdens limitations. Access to communications, the commenter argued, would never fundamentally alter the nature of the service. The commenter continued that any burdens would be the result of the societal goal of eliminating barriers and therefore cannot be "undue." The Agency disagrees. The commenter's position is not required by the case law. The Agency believes that only rare circumstances would qualify for these limitations. For example, the nature of certain communications demands could effectively limit the Agency's capability to deliver the program or activity. In such unlikely circumstances, a fundamental alteration or undue burden would exist and the need for these limitations is apparent.

#### *Section 707.10 Auxiliary Aids*

This section requires that the Agency provide auxiliary aids when needed to

afford individuals with handicaps an equal opportunity to participate in and enjoy the benefits of Agency activities. The Agency is required to give primary consideration to the type of auxiliary aid requested by an individual with handicaps, and is not required to provide individually prescribed devices. So, for example, the Agency might be required to provide an assistant to turn pages for a quadriplegic witness at a hearing, but would not be required to provide the same witness with an electric wheelchair.

One commenter indicated that if the individual's choice of the type of auxiliary aid is only given primary consideration, as opposed to exclusive consideration, the Agency should not balance the individual's request against cost considerations, where cost considerations may militate against providing aids in the "most integrated setting appropriate." Section 707.6(d) already provides that programs will be administered in the most integrated setting appropriate for qualified individuals with handicaps. The Agency believes it unnecessary to duplicate the language of § 707.6(d) to clarify the Agency's limitations. The Agency shall, however, honor an individual's choice of auxiliary aids unless it can demonstrate that another effective means of communications exists or that use of the means chosen would not be required under § 707.9(e).

One commenter requested the § 707.9(b) be revised by inserting a provision indicating, among other things, that a note pad is rarely sufficient for effective communications, and that effective communications for persons with a hearing impairment is achieved by sign language interpreters or assistive listening devices. Although in some circumstances, a note pad and written materials may be sufficient to permit effective communications with a hearing-impaired person, the Agency agrees that in other circumstances they may not be adequate, particularly when the information being communicated is complex or exchanged for a lengthy period of time (e.g., a meeting) or where the hearing-impaired individual is not skilled in the spoken or written language. In these cases, a sign language interpreter may be appropriate. For vision-impaired persons, effective communications might be achieved by several means, including readers and audio recordings. In general, the Agency intends to inform the public of (1) the communications services it offers to afford individuals with handicaps an equal opportunity to participate in or benefit from its programs or activities,

(2) the opportunity to request a particular mode of communication, and (3) the Agency's preferences regarding auxiliary aids if it can demonstrate that several different modes are effective.

#### *Section 707.11 Elimination of Discriminatory Qualification and Selection Criteria*

Section 707.11 deals with the elimination of discriminatory qualifications and selection criteria. It prohibits the use of qualifications standards, eligibility requirements, and selection criteria that absolutely exclude certain classes of disabled persons, (e.g., individuals with epilepsy, a hearing impairment, or a heart ailment) from participation in programs or activities without regard to an individual's actual ability to participate. The use of an irrefutable presumption of inability to participate is permissible only when, in all cases, a condition by its very nature would absolutely prevent an individual from meeting the essential eligibility requirements for participation in the activity in question. It would be permissible, therefore, to exclude without an individual evaluation all persons who are blind in both eyes from eligibility for a license to operate a commercial vehicle in interstate commerce; but it may not be permissible to automatically disqualify all those who are blind in just one eye. The wording of this section is drawn from the preamble discussion relating to § 39.130 of the Department of Justice's section 504 regulation for federally conducted programs. 28 CFR part 39. For greater clarity and emphasis, § 707.11 expressly incorporates this discussion as a provision of this regulation.

A commenter advocated that the irrefutable presumption limitation of this section was inappropriate in light of *School Bd. of Nassau County v. Arline*, 107 S.Ct 1123 (1987), which stated that an individualized determination was required in decisions for each person. The Agency believes that the commenter misunderstands the nature of the irrefutable presumption limitation. The provision is not a grant of authority but a rigid limitation which the Agency imposes upon itself. Exclusionary practices which some institutions have applied in the past are not permissible under the regulation. Only irrefutable presumptions of a very limited nature are permitted. Recognizing the significance of the irrefutable presumption limitation, the Agency decided to incorporate this limitation into the text of the regulation, rather than having it appear only in the analysis.

#### *Section 707.12 Compliance Procedures*

Paragraph (a) specifies that paragraphs (c) through (l) of this section establish the procedures for processing complaints other than employment complaints.

Paragraph (b) provides that the Agency will process section 504 employment complaints according to existing regulations of the EEOC (29 CFR part 1613) established for adjudication of complaints pursuant to section 501 of the Rehabilitation Act.

Paragraph (f) requires the Agency to notify the Architectural and Transportation Barriers Compliance Board upon receipt of a complaint alleging that a facility subject to the Barriers Act was designed, constructed, or altered in a manner that does not provide ready access and use to individuals with handicaps.

Paragraph (g) requires the Agency to provide to the complainant, in writing, findings of fact and conclusions of law, the relief granted if noncompliance is found, and notice of the right to appeal (§ 707.12(g)). One appeal within the Agency shall be provided (§ 707.12(i)). The appeal will be heard by the Staff Director or his or her designee (§ 707.12(j)).

Paragraph (k) authorizes the Staff Director to extend certain time limits established in this section in particular cases where there is good cause to do so.

Paragraph (l) permits the Agency to delegate its authority for investigating complaints to other Federal agencies. However, the statutory obligation of the Agency to make a final determination of compliance or noncompliance may not be delegated.

Commenters have suggested a number of additions to the compliance section. Comments propose providing for attorney's fees and compensation for the prevailing party, as well as judicial review without exhaustion of administrative remedies. An individual's right to receive either attorney's fees or compensation is outside the scope of this regulation. Similarly, discretion for judicial review is not properly within the ambit of this regulation. Another comment requests a provision that would provide we obtain the expertise of the Architectural and Transportation Barriers Compliance Board. The regulation already contains a notice for contacting the Board under certain circumstances. An additional comment requests a statement that all regulations and other directives relating to discrimination be superseded by this regulation. The Agency views other

regulations or directives that do not provide the protection given by this regulation as inadequate compliance with our view of the obligations imposed under section 504. Another comment requested that the parameters for submitting or obtaining evidence used to decide appeals be more fully described. The grounds for an appeal can be varied, and it is inappropriate and impractical to attempt to establish parameters for all appeals.

#### List of Subjects in 45 CFR Part 707

Blind, Buildings, Civil rights, Equal employment opportunity, Federal buildings and facilities, Government employees, Handicapped.

Dated: February 12, 1990.

Melvin L. Jenkins,

*Acting Staff Director.*

For the reasons set forth in the preamble, 45 CFR part 707 is added as follows:

### PART 707—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY U.S. COMMISSION ON CIVIL RIGHTS

Sec.

- 707.1 Purpose.
- 707.2 Application.
- 707.3 Definitions.
- 707.4 Self-evaluation and remedial measures.
- 707.5 Notice.
- 707.6 General prohibitions against discrimination.
- 707.7 Employment.
- 707.8 Physical access.
- 707.9 Access to communications.
- 707.10 Auxiliary aids.
- 707.11 Eliminating discriminatory qualifications and selection criteria.
- 707.12 Compliance procedures.

Authority: 29 U.S.C. 794

#### § 707.1 Purpose.

The purpose of this part is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

#### § 707.2 Application.

This part applies to all programs and activities, including employment, conducted by the Agency.

#### § 707.3 Definitions.

For the purposes of this part, the term—

(a) "Agency" means the U.S. Commission on Civil Rights and its State Advisory Committees.

(b) "Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the Agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

(c) "Complete complaint" means a written statement that contains the complainant's name and address and describes the Agency's alleged discriminatory action in sufficient detail to inform the Agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

(d) "Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, vehicles, or other real or personal property.

(e) "Individual with handicaps" means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. As used in this definition, the phrase:

(i) "Physical or mental impairment" includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease,

diabetes, mental retardation, emotional illness, drug addiction, and alcoholism.

(2) "Major life activities" includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) "Is regarded as having an impairment" means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the Agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (e)(1) of this definition but is treated by the Agency as having such an impairment.

(f) "Qualified individual with handicaps" means—

(1) With respect to any Agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with handicaps who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the Agency can demonstrate would result in a fundamental alteration in its nature; and

(2) With respect to employment, an individual with handicaps who meets the definition set forth in 29 CFR 1613.702(f), which is made applicable to this part by § 707.7 of this rule.

(3) With respect to any other Agency program or activity, an individual with handicaps who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity.

(g) "Section 504" means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (19 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516, 88 Stat. 1617); the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978 (Pub. L. 95-602, 92 Stat. 2955); the Rehabilitation Act Amendments of 1986 (Pub. L. 99-506, 100 Stat. 1810); and the Civil Rights Restoration Act of 1987 (Pub. L. 100-259, 102 Stat. 28). As used in this part, section 504 applies only to

programs or activities conducted by the Agency. The Agency does not operate any programs of Federal financial assistance to other entities.

#### **§ 707.4 Self-Evaluation and Remedial Measures.**

(a) The Agency shall, within one year of the effective date of this part, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part, and, to the extent modification of any such policies and practices is required, the Agency shall proceed to make the necessary modifications.

(b) The Agency shall provide an opportunity to interested persons, including individuals with handicaps and organizations representing individuals with handicaps, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The Agency shall, for at least three years following completion of the evaluation required under paragraph (a) of this section, maintain on file and make available for public inspection:

- (1) A description of areas examined and any problems identified; and
- (2) A description of any modifications made.

#### **§ 707.5 Notice.**

(a) The Agency shall make available to all employees, applicants, and other interested persons, as appropriate, information regarding the provisions of this part and its applicability to the programs or activities conducted by the Agency, and such information shall be made available to the extent the Staff Director finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this part.

(b) The Agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The Agency shall take appropriate steps to provide individuals with handicaps with information regarding their section 504 rights under the Agency's programs or activities.

#### **§ 707.6 General prohibitions against discrimination.**

(a) No qualified individual with handicaps shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the Agency.

(b)(1) The Agency, in providing any aid, benefit, or service, shall not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified individual with handicaps the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with handicaps an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with handicaps with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to individuals with handicaps or to any class of individuals with handicaps than is provided to others unless such action is necessary to provide qualified individuals with handicaps with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified individual with handicaps the opportunity to participate as a member of planning or advisory boards or committees; or

(vi) Otherwise limit a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The Agency shall not deny a qualified individual with handicaps the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The Agency shall not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified individuals with handicaps to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity, with respect to individuals with handicaps.

(4) The Agency shall not, in determining the site or location of a facility or activity make selections the purpose or effect of which would—

(i) Exclude individuals with handicaps from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the Agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(5) The Agency, in the selection of procurement contractors, shall not use criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to individuals with handicaps or the exclusion of a specific class of individuals with handicaps from a program limited by Federal statute or Executive order to a different class of individuals with handicaps is not prohibited by this part.

(d) The Agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

#### **§ 707.7 Employment.**

No qualified individual with handicaps shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the Agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR part 1613, shall apply to employment in programs or activities conducted by the Agency.

#### **§ 707.8 Physical Access.**

(a) *Discrimination prohibited.* Except as otherwise provided in this section, no qualified individual with handicaps shall, because the Agency's facilities are inaccessible to or unusable by individuals with handicaps, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the Agency.

(b) *Existing facilities-program access.*—(1) *Existing facilities defined.* For the purpose of this section, "existing facilities" means those facilities owned, leased or used through some other arrangement by the Agency on March 28, 1990.

(2) *General.* The Agency shall operate each program or activity conducted in an existing facility so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not—

(i) Necessarily require the Agency to make each of its existing facilities

accessible to and usable by individuals with handicaps.

(ii) Require the Agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where Agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the Agency has the burden of proving that compliance with this paragraph would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Staff Director or his or her designee after considering all Agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the Agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity.

(3) *Methods.* (i) The Agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to individuals with handicaps, delivery of services at alternative accessible sites, alteration of existing facilities, use of accessible vehicles, or any other methods that result in making its program or activities readily accessible to and usable by individuals with handicaps.

(ii) The Agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (b)(2) of this section. The Agency, in making alterations to existing buildings to achieve program accessibility, shall meet accessibility requirements imposed by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), as established in 41 CFR 101-19.600 to 101-19.607.

(iii) In choosing among available methods for meeting the requirements of this section, the Agency shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

(4) *Time period for compliance.* The Agency shall comply with the obligations established under this section within sixty days of the effective date of this part, except that where structural changes in facilities are undertaken, such changes shall be made within three years of the effective date of this part, but in any event as expeditiously as possible.

(5) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the Agency shall develop, within 6 months of the effective date of this part, a transition plan setting forth the steps necessary to complete such changes. The Agency shall provide an opportunity to interested persons, including individuals with handicaps and organizations representing individuals with handicaps, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(i) Identify physical obstacles in the Agency's facilities that limit the accessibility of its programs or activities to individuals with handicaps;

(ii) Describe in detail the methods that will be used to make the facilities accessible;

(iii) Specify the schedule for taking the steps necessary to achieve compliance with this paragraph and, if the time period of the transition plan is longer than 1 year, identify steps that will be taken during each year of the transition period; and

(iv) Indicate the official response for implementation of the plan.

(6) The Agency shall provide signs at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(c) *New purchases, leases or other arrangements.* (1) Any building or facility acquired after March 28, 1990, whether by purchase, lease (other than lease renewal), or any other arrangement, shall be readily accessible to and usable by individuals with handicaps.

(2) Nothing in this paragraph requires the Agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where Agency personnel believe that the proposed action would

fundamentally alter the program or activity or would result in undue financial and administrative burdens, the Agency has the burden of proving that compliance with this paragraph would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Staff Director or his or her designee after considering all Agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the Agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity.

(d) *New construction and alterations.* Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the Agency shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with handicaps in accordance with the requirements imposed by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), as established in 41 CFR 101-19.600 to 101-19.607.

#### § 707.9 Access to Communications.

(a) *Discrimination prohibited.* Except as otherwise provided in this section, no qualified individual with handicaps shall, because the Agency's communications are inaccessible to or unusable by individuals with handicaps, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the Agency.

(b) The Agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(c) *Specific requirements regarding oral communications.* (1) *Telecommunications devices for deaf persons.* (i) The Agency headquarters and each regional office shall maintain and reliably answer at least one telecommunications device for deaf persons (TDD) or equally effective telecommunications device.

(ii) The Agency shall ensure that all Agency letterhead, forms, and other documents listing any Agency telephone number list the appropriate TDD numbers.

(2) *Interpreter service.* (i) The Agency shall establish a reliable system for the provision of qualified interpreters to individuals with handicaps for Agency programs or activities. This provision does not require the Agency to have an interpreter on staff, but does require the Agency to be able to provide a qualified interpreter on reasonable notice.

(ii) Notice of the availability of interpreter service shall be included in all announcements notifying the public of Agency activities to which the public is invited or which it is permitted to attend, including but not limited to the U.S. Commission on Civil Rights' meetings, consultations, hearings, press conferences and State Advisory Committee conferences and meetings. This notice shall designate the Agency official(s) and the address, telephone and TDD number to call to request interpreter services.

(d) *Specific requirements for printed communications.* (1) The Agency shall establish a system to provide to individuals with handicaps appropriate reader or taping service for all Agency publications which are available to the public. This provision does not require the Agency to have a reader or taper or staff, but does require the Agency to be able to provide appropriate reader or taping service within a reasonable time and on reasonable notice. The Agency shall effectively notify qualified individuals with handicaps of the availability of reader or taping services.

(2) Notice of the availability of reader or taping service shall be included in all publications which are available to the public. This notice shall designate the Agency official(s) and the address, telephone and TDD number to call to request interpreter services.

(e) Nothing in this section or § 707.10 requires the Agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where Agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the Agency has the burden of proving that compliance with this section or § 707.10 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Staff Director or his or her designee after considering all Agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a

written statement of the reasons for reaching that conclusion. If an action required to comply with this paragraph would result in such an alteration or such burdens, the Agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with handicaps receive the benefits and services of the program or activity.

#### **§ 707.10 Auxiliary aids.**

(a) The Agency shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the Agency.

(b) In determining what type of auxiliary aid is necessary, the Agency shall give primary consideration to the requests of the individual with handicaps.

(c) The Agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

#### **§ 707.11 Eliminating discriminatory qualifications and selection criteria.**

The Agency shall not make use of any qualification standard, eligibility requirement, or selection criterion that excludes particular classes of individuals with handicaps from an Agency program or activity merely because the persons are handicapped, without regard to an individual's actual ability to participate. An irrebuttable presumption of inability to participate based upon a handicap shall be permissible only if the condition would, in all instances, prevent an individual from meeting the essential eligibility requirements for participating in, or receiving the benefits of, the particular program or activity.

#### **§ 707.12 Compliance procedures.**

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the Agency.

(b) The Agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) Responsibility for implementation and operation of this section shall be vested in the Office of General Counsel.

(d) The Agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The Agency may extend this time period for good cause.

(e) If the Agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate Government entity.

(f) The Agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), is not readily accessible to and usable by individuals with handicaps.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the Agency shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the Agency of the letter required by § 707.12(g). The Staff Director may extend this time for good cause.

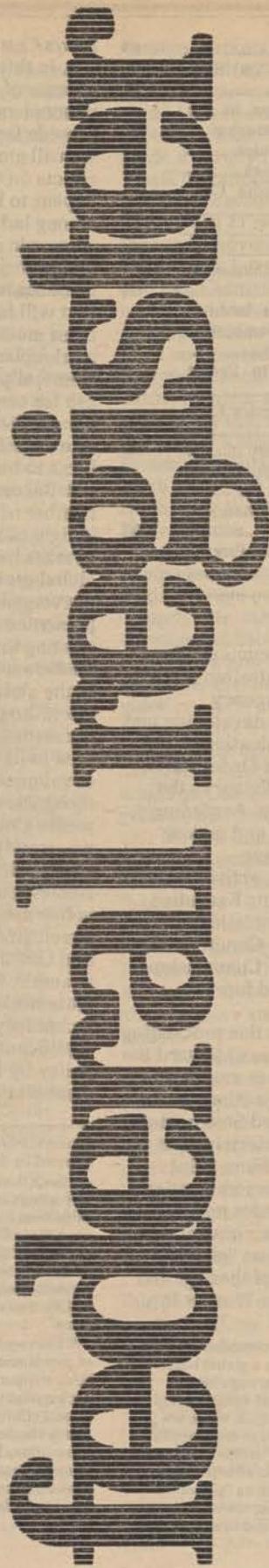
(i) Timely appeals shall be accepted and processed by the Staff Director or the Staff Director's designee.

(j) The Agency shall notify the complainant in writing of the results of the appeal within 60 days of the receipt of the request. If the head of the Agency determines that additional information is needed from the complainant, it shall have 60 days from the date it receives the additional information to make its determination on the appeal.

(k) The time limits cited in paragraphs (d), (g), (h), and (j) of this section may be extended for an individual case when the Staff Director determines that there is good cause, based on the particular circumstances of that case, for the extension.

(l) The Agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another Agency.





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**Friday**  
**February 16, 1990**

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## **Part VI**

# **Department of Commerce**

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**National Telecommunications and  
Information Administration**  
**Comprehensive Study on the  
Globalization of Mass Media Firms;  
Notice of Inquiry and Request for  
Comments**

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**DEPARTMENT OF COMMERCE****National Telecommunications and Information Administration**

[Docket No. 900241-0041]

**Comprehensive Study on the Globalization of Mass Media Firms****AGENCY:** National Telecommunications and Information Administration (NTIA), Commerce.**ACTION:** Notice of inquiry; request for comments.

**SUMMARY:** NTIA is initiating an inquiry into the current trend of global growth of mass media firms and its communications policy implications. Public comment is requested on a wide range of matters relevant to such an inquiry. NTIA intends to assemble a record of public comment to assist in the continuing formulating of U.S. communications policy, to identify specific communications subject areas and issues warranting further inquiry, and, where appropriate, to identify related matters in need of attention by other governmental agencies or departments.

**DATES:** Comments should be received no later than May 11, 1990, in order to receive full consideration. Reply comments should be received no later than June 22, 1990.

**ADDRESSES:** Comments and replies (five copies of each) should be sent to: Office of Policy Analysis and Development, National Telecommunications and Information Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Room 4725, Washington, DC 20230.

**FOR FURTHER INFORMATION CONTACT:** Julian Shepard or Lisa Vawter, NTIA Office of Policy Analysis and Development, 202-377-1880.

**Authority:** Executive Order 12046, 3 CFR, 1978 Comp., p. 158; reprinted in 47 U.S.C. 305 note.

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2. Vertical Integration .....	40	News Corp., and Sony Corporation. <sup>2</sup>
a. Financial Interest and Syndication Rules .....	41	3. In this Notice we address two aspects of the globalization phenomenon. First, we ask parties to provide factual information on the trend we call globalization, its origins, and its effects on the media industry. There appear to be differences of opinion among industry observers about the economic and competitive factors underlying this trend and whether globalization is a long-term phenomenon that will increasingly characterize the mass media industry or a short-term marketplace aberration that will eventually fall of its own weight. We ask for comments on these different views. We also seek comment on the role of technology in spurring media firms to become global in scope.
b. Vertical Integration in the Cable Television Industry .....	49	4. Second, we seek comment on a number of communications policy issues in light of the trend toward globalization of mass media. In the last few years, the global growth of media firms and the convergence of media technologies have presented significant policy questions relating to media industry structure, media content, and U.S. competitiveness in the global media marketplace.
3. Foreign Ownership Rules .....	53	Accordingly, NTIA plans to reassess domestic laws and regulations in this area in light of global media developments. However, we also recognize that the policy implications of media globalization may well transcend a narrowly-defined domestic communications policy framework.
4. General Antitrust Issues .....	56	Achievement of U.S. objectives in many policy areas can be influenced by developments in mass media industries and U.S. mass media policy choices. For example, it appears that the global dissemination of electronic media and technology is playing an increasingly significant role in promoting U.S. foreign policy by fostering demand for democratic reforms internationally. <sup>3</sup>
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**I. Introduction**

1. The National Telecommunications and Information Administration (NTIA) is the Executive Branch agency primarily responsible for developing and articulating U.S. communications policies. Under Executive Order 12046, NTIA acts as principal advisor to the President on such policies. Accordingly, NTIA conducts inquiries and makes recommendations regarding communications policies, activities, and opportunities, and presents Executive Branch views on communications matters to the public, the Congress, the Federal Communications Commission (the FCC), state, local and foreign governments.

2. NTIA is undertaking this proceeding to explore the apparent trend toward the "globalization" of the mass media industry and its communications policy implications for the United States. Many providers of news and entertainment television programming, films, print media, and other mass communications compete in several countries and indeed on several continents. For convenience, we refer to these entities as "global" media firms.<sup>1</sup> Examples of these global media firms include Time-Warner Inc.,

<sup>1</sup> Current economic literature describes several ways in which firms compete on a global basis, including exporting, operating through foreign subsidiaries, participating in joint ventures, and licensing for royalties. In this Notice, while we describe the various ways in which mass media firms compete with one another across national boundaries, we do not attempt to offer precise, analytic definitions of terms such as "global" or "globalization." Parties, however, are welcome to suggest such formal definitions and to explain how

their underlying analyses and recommendations are affected by the definitions they propose.

<sup>2</sup> Such firms may also include the Regional Bell Operating Companies (RBOCs) when engaged in cable television ventures abroad. We do not focus upon these firms because the overseas media ventures of the RBOCs appear relatively small in contrast to their primary domestic activities. Nevertheless, we invite comment on the role of the RBOCs and other telephone companies as "media firms".

<sup>3</sup> The recent emergence, and dramatic successes, of pro-democracy movements in Eastern Europe has been attributed by some to the ability of citizens in each nation to witness through news reports the reform efforts and achievements of their neighbors. See B. Harden, *Shortwave Radio Shaped the Revolution*, The Washington Post, Dec. 29, 1989 at 1. In many cases, these reports come from Western media sources. For example, West German TV can be seen in East Germany; Austrian TV can be seen

Continued

More generally, public opinion on a worldwide basis is increasingly shaped by global media. Another focus of our inquiry, therefore, is the impact of global media on social, cultural, and political developments worldwide.

## II. Factual Inquiry

### A. Industry Structure

#### 1. Examples of Global Media Firms

5. Several media firms have recently grown into large companies with international interests in television, film, music, video, and print media. NTIA notes that the following are only a few of the growing number of firms with global interests. For example, News Corp., 45% owned by Rupert Murdoch, owns the *New York Post*, the *London Times*, and the Hong Kong *South China Morning Post*. It also owns Fox Broadcasting Company (a fledgling fourth broadcast network in the United States), seven U.S. television stations in major markets, and Twentieth Century Fox Film. News Corp. also owns the Sky Channel in Western Europe. In the print area, News Corp. has a financial interest in at least 23 commercial printing operations worldwide, which have been recently consolidated into one global publishing operation, Harper & Collins Publishers.<sup>4</sup>

6. Time-Warner Inc., which is based in the United States, participates in global media markets by producing and distributing print and electronic information and entertainment material. Time-Warner publishes *Time Magazine*, *People*, *Sports Illustrated*, *Fortune*, *France*, and *Asia Week*. It controls Warner Bros. Television Production, American TV and Communications Corp. (an operator of cable systems), Home Box Office, and Cinemax. It also has an ownership interest in Black Entertainment Television. In the music area, Time-Warner controls Atlantic Records and Warner-Chappel Music.<sup>5</sup>

in Hungary, and Finnish TV reaches Soviet Estonia. See T. Rosenstiel, *TV, VCRs Fan Fire of Revolution* Los Angeles Times, January 18, 1990, at 1. Similarly, tourists with home video equipment shared the realities of China's Tiananmen Square crackdown with media firms serving global audiences. In addition, facsimile machines played an important role last spring in allowing China's pro-democracy movement to communicate with supporters worldwide. C. McAllister (ed.) *Piercing the Chinese Wall: All the News That's Fit to Fax*, Business Week, Dec. 4, 1989 at 114C.

<sup>4</sup> See *The Media Imperialists*, Media Business Quarterly Review, First Quarter, 1988, at 40. See also W. Koschnick, *As I See It: An Interview with Rupert Murdoch*, Forbes, Nov. 27, 1989, at 98.

<sup>5</sup> Moreover, pursuant to a recent agreement with Sony, Time-Warner has acquired a 50% interest in the Columbia House unit of CBS Records, which is the largest direct marketer of records, tapes, and video cassettes.

Foreign markets provided pre-merger Warner with 67% of its revenue in the recorded music area. Overall, Warner earned approximately 20% of its revenue abroad in 1988.<sup>6</sup> In addition, Warner has made a variety of investments in media assets in various countries.

7. Bertelsmann AG has financial interests in 21 record companies around the world, several German film studios, RTL Plus (a Luxembourg TV station), and two German radio stations, among other broadcast and programming holdings. It also owns French language book and record clubs in Western Europe, Spanish language book clubs in Latin America, and English language book clubs in Canada, the United States, the United Kingdom, and Australia. Bertelsmann also owns Bantam Doubleday Dell Publishing Group and Doubleday Bookstore Group of the United States.

8. Sony, best known as an electronic equipment manufacturer, produces chips, storage media, and electronic components, studio equipment for television stations, professional video equipment, and a wide range of consumer electronic products, including video cassette cameras and recorders, television receivers, and high fidelity audio components and systems. Sony owns CBS Records and recently acquired Columbia Pictures, which produces both television programming and feature films. With this purchase, Sony also acquired Loews Theater Management Corp., a chain of over 820 theaters.<sup>7</sup>

9. Hachette, S.A. owns a French TV production company, several West European and U.S. magazines, as well as a pan-European radio station. Its shareholders are primarily French and Italian.<sup>8</sup>

10. While these examples of global media firms are impressive in their own right, we wish to gather additional information on the breadth of media firms' participation in the global marketplace. We request comment on the size of this marketplace and its participants. How has this industry changed over the last ten years? What factors have caused it to change?

11. We request comment on whether this pattern of extensive international media holdings by relatively few media firms represents a fundamental

restructuring of the mass media business or a short-term phenomenon. Some industry participants believe that in the next decade the media and entertainment industry may be dominated by a few vertically integrated global giants that will be large enough to create, produce, and distribute information on a worldwide scale.<sup>9</sup> Others note, however, that even after the recent mergers and acquisitions in some portions of the media business, the large holding companies of the 1980s account for only a small portion of the sector's world revenue. One estimate notes that the combined 1988 revenues of Bertelsmann, News Corp., Hachette, and the pre-merger Time and Warner, equal approximately \$45 billion, or only 18% of the \$250 billion worldwide information industry.<sup>10</sup> To what degree are global media markets becoming concentrated, Are product or program markets converging on an international scale?

#### 2. Industry Sectors

12. To further develop our understanding of the factors affecting international mass media firms, NTIA requests comment on a more comprehensive description of the global media marketplace. In the following paragraphs, we tentatively define four "industry sectors" in which global media firms compete. We ask whether such definitions accurately describe the global media marketplace. If not, we request other characterizations of relevant industry sectors.<sup>11</sup> We recognize that the industry sectors we define below, as well as some of the policy issues we address in later parts of this Notice, may not apply to specific activities of media firms. For example, the economics of producing, distributing and exhibiting films may differ from those of broadcasting. From what other sectors may new entrants in the global media business emerge?

<sup>4</sup> *Time Inc. & Warner Communications: Media Giants Strike Merger Deal*, Broadcasting, Mar. 13, 1989, at 28.

<sup>5</sup> *Time-Warner and the Shrinking Media World*, Broadcasting, Mar. 13, 1989, at 27. This estimate is based on business activity in books, business information, film production, distribution, and theatrical exhibition, home video, magazines, newspapers, radio, records and TV production, distribution, and exhibition.

<sup>6</sup> Although we recognize that print media interests often constitute substantial portions of global media firms' portfolios, we have decided to keep our principal focus in this proceeding on electronic media. Parties are welcome, however, to address relevant print-related issues, such as the importance of print ownership to global media companies, the interrelationship of print and electronic media policy issues, and the extent to which print has influenced the globalization trend.

<sup>7</sup> See testimony of J. Richard Munro and Steven J. Ross Before the Subcommittee on Economic and Commercial Law, Committee on the Judiciary, U.S. House of Representatives, March 14, 1989.

<sup>8</sup> *A Look At Both Sides Electronic Media*, Oct. 2, 1989, at 1.

<sup>9</sup> Shugaar, Ahrens, and Stuart. *Egos and Empires: The Publishers in TV*, Television Business International, Apr., 1989, at 71.

**13. Program production.** By "programs" we mean information or entertainment material that is distributed in a visual or audio format. Visual programs (and their producers) include films (e.g., Walt Disney Studios), television and cable TV shows (e.g., Lorimar Television Production and ESPN), and pre-recorded home video (e.g., HBO Home Video). The consumers of this programming are movie-goers, television and cable audiences, and commercial and home video users.

**14. Audio programs** include audio broadcast material produced by broadcast networks, stations, or independent producers, and records, tapes, and compact discs produced by firms such as CBS Records, Deutsche Grammophon, Philips, and EMI. The consumers of audio programs are music and radio listeners.

**15. Program packaging.** We define the "program packaging" sector to include firms that purchase entertainment programming from producers, arrange it into programming schedules or "packages", and market these packages to program distributors such as cable operators and broadcast stations. Firms active in the program package area include Nickelodeon, Showtime, and broadcast networks.

**16. Program transmission, distribution, and exhibition.** The "transmission" sector includes providers of services and facilities that serve as conduits for the distribution of programming, including broadcasters, cable television systems, satellite services, and other alternative distribution services, such as multichannel multipoint distribution service (MMDS). In addition, "distribution" of programming also occurs through the sale and dissemination of "hard" recorded information, such as video or audio cassette tapes, and through exhibition of films in theater chains.

**17. Manufacturing.** Companies in the "manufacturing" sector produce equipment, consumer electronics, and telecommunications customer premises equipment that support activities in each of the other industry sectors described above. Manufacturers also produce the storage media needed for program production, such as records, tapes, compact discs, and video cassettes.

**18. Individual media firms** may participate in more than one of the industry sectors. For example, the television broadcast networks produce some of their own programming, "package" programming into a network schedule of shows, and distribute programming to consumers through their

own local television stations.<sup>12</sup> Time-Warner participates in the first three categories through its movie production facilities (i.e., Warner Bros. Studios), its ownership of HBO, and its ownership of cable systems (e.g., ATC). Broadcast stations not only serve as "distributors" of network programs, they produce their own programming (e.g., local news shows) and "package" programs purchased from others in developing their broadcast schedules.

**19.** We have already noted that Sony has recently become involved in audio and video program production, information distribution, and manufacturing. We note that Victor Co., the consumer electronics manufacturer, has committed \$100 million to produce movies with Hollywood's Lawrence Gordon. While these combinations are examples of hardware and programming integration, there may also be a trend toward the integration of programming and distribution.<sup>13</sup> For example, Telecommunications, Inc. (TCI), the largest U.S. cable television firm, has large programming and cable distribution interests, while Fox Broadcasting owns a film studio as well as broadcast interests.

**20.** NTIA requests information on the size of these industry sectors. Which firms are most prominent in each of these industry sectors? Where are the major markets in each of these sectors? How do participants in each sector successfully compete internationally? In addition, NTIA seeks comment and information on the degree to which media firms participate in more than one of these industry sectors and generally on trends toward integration among sectors. What efficiencies or strategic advantage do media firms hope to achieve when they move into related sectors? How successful are such integration strategies in achieving these goals?

### 3. National Identity Issues

**21.** We also ask whether the formulation of communications policies to promote U.S. competitiveness in global media markets requires the identification of "national" identities for firms doing business in the United

States. Press reports on global media firms often attach labels of nationality on such firms, resulting in, for example, a discussion of "Japanese" consumer electronics companies, "West German" media firms, and "U.S." programming.<sup>14</sup> As discussed below, an element of the globalization trend is for firms to compete in many different countries whose markets are as large or larger than the market in the home base or country of ownership. An example of a company that has pursued this strategy on a European scale is Hachette, a firm often described as French, that has holdings in many countries in Western Europe as well as in the United States.

**22.** Indeed, Rupert Murdoch's News Corp. is sometimes referred to as Australian, and sometimes as American. As a naturalized U.S. citizen, Mr. Murdoch is permitted under U.S. law to own or control TV stations, and his News Corp. owns seven stations, as well as several other media concerns. However, News Corp. is still widely associated in the press with Australia, the location of well over half of News Corp.'s affiliated companies.<sup>15</sup>

**23.** Does the formulation of U.S. communications policy require the identification of "national" identities for mass media firms doing business in the United States? Does the trend toward globalization of mass media firms make determinations of national identity more, or less, relevant to U.S. policy development?

**24.** There are many factors that could be used to determine the national identity of a media firm, including: (a) The percentage of a firm's ownership that is held by nationals of a particular country; (b) the national identities of persons that control the firm; (c) the national incorporation of the firm or its corporate parent.<sup>16</sup> If global media firms are to be assigned national identities, on what basis should this be done? What factors should be considered, and what should their relative weights be? At what point does a growing "domestic" firm become "global" for purposes of competitiveness policy? How should U.S. subsidiaries of global firms be treated? How do media firms view each other in this regard?<sup>17</sup> If the apparent

<sup>12</sup> The scope of network participation in the first and last of these markets (production and distribution) is substantially limited by government regulations. See paras. 41-48 *infra*.

<sup>13</sup> According to press reports, Sumitomo, a leading producer of fiber optics and coaxial cable, has bought the rights to air some 2000 films on its two Japanese cable television channels. Sumitomo has expressed an interest in joining with a Hollywood studio to distribute films worldwide. Y. Ono, *Corporate Japan Reaches for the Stars As it Pursues Investments in Hollywood*. Wall Street Journal, Oct. 11, 1989, at A15.

<sup>14</sup> See, e.g., A. Hartmetz, *Now Showing: Survival of the Fittest*, The New York Times, Oct. 22, 1989, at section 2, p. 1.

<sup>15</sup> See also *Foreign Entanglements*, Broadcasting, Feb. 5, 1990 at 8.

<sup>16</sup> The Communications Act of 1934 contains a set of standards for foreign ownership or control for purposes of determining a firm's eligibility to hold certain radio frequency licenses, including broadcast licenses. See paras. 53-55 *infra*.

<sup>17</sup> In this Notice, we do not intend to identify any particular firm with a nationality. We do mention

Continued

trend toward globalization in this industry continues, will attempts to assign national identities to media firms become increasingly problematic?

25. As a corollary issue, some industry observers note that "foreign" media firms have made U.S. acquisitions an integral part of their global strategy. U.S. firms have not, in the past, engaged in foreign investments on the same scale.<sup>18</sup> Instead, U.S. media firms have engaged with great success in the international sale and distribution of their films, programs, and information.<sup>19</sup> Is it the case that U.S. firms do not, in general, make foreign media investments?<sup>20</sup> If so, what are the reasons for this approach? Are there regulatory impediments abroad which preclude or limit such acquisitions? Are investments in foreign media firms simply viewed as inferior to investments that can be made in our own domestic markets? To what extent are U.S. media firms pursuing joint ventures or co-production agreements with foreign firms? To what extent are such arrangements necessary for U.S. firms to enter foreign markets?

specific national labels that the press or other commentators have used to denote firms, and we also discuss "U.S." and "foreign" media firms generally when such distinction has potential policy significance. By doing so, we do not intend to prejudge our inquiry on these matters.

<sup>18</sup> N. Yanowitch, *U.S. Programmers Dominate Overseas Market: Strict Ownership Rules Inhibit U.S. Acquisitions*, *Media Business Quarterly Review*, First Quarter, 1988, at 52. For example, recent press reports indicate that News Corp., characterized as an "Australian" firm, has spent \$5.8 billion to acquire several U.S. media companies in areas from TV stations to magazines. Sony Corporation paid \$2 billion in 1987 for CBS Records, and will pay approximately \$3.4 billion for Columbia Pictures. In separate 1986 deals, Bertelsmann paid \$775 million to acquire Doubleday Books and RCA/Arista Records. In contrast, "U.S." media firms appear to focus their acquisition or merger strategy on other U.S. properties, as evidenced by such recent combinations as the Time-Warner merger and Turner Broadcasting's purchase of the MGM film library.

<sup>19</sup> Opportunities for U.S. program distribution may be improved by the rise in the number of independent television outlets worldwide and changes in the regulation of information services in some countries. Much of this new demand could come from Western Europe, where the number of major commercial television channels has climbed from 25 to 55 since 1980. Some observers predict that in the 1990s, as satellite delivery and new cable systems mature, the number could more than double again, to over 120. See D. Pedersen, *Boom On The Tube*, *Newsweek*, Oct. 9, 1989, at 40.

<sup>20</sup> One area in which U.S. firms have become increasingly active is joint ventures to build and operate cable television systems in foreign countries. Some RBOCs have been among those to enter cable television markets abroad. Pacific Telesis, for example, has acquired interests in three U.K. cable television companies with a combined coverage of 750,000 homes. US West is participating in the venture that will lay the first cable television system in Hong Kong. These firms cannot provide cable television service in the United States because of legal and regulatory restrictions.

#### B. Reasons For Globalization

26. While we have discussed examples of global media firms, we request comment on why such globalization takes place. There may, of course, be several reasons for any such decision by a firm. A firm could choose to operate on a global scale to achieve scope or scale economies. Vertical integration on an international basis could permit the realization of scope economies, since resources (e.g., technological or marketing expertise) that a media firm employs in one of the industry sectors identified above could also be useful in competing in another sector. Moreover, global demand may permit a firm to achieve significant economies of scale not available in any single national market. In addition, there may be substantial differences in the costs of production factors, such as labor or raw materials, among countries, thereby encouraging international operations. This may make a firm with international operations more cost-competitive than one with operations solely in one country. Furthermore, globalization may allow firms to adjust their strategy in one area based upon experiences with their competitors in other areas.<sup>21</sup> Investment abroad may also permit firms to avoid the effects of specific foreign trade barriers and policies.

27. We seek comment on the extent to which these factors underlie the apparent trend toward mass media globalization. Are there meaningful economies of scope or scale for global media firms? If so, what are they? Are there any other economies beyond scope or scale that may be present in global media firms' operations? What evidence is there that global media firms act strategically by adjusting their plans in one area based on their experiences with competitors in other areas? Finally, to what extent does globalization help media firms avoid the effects of foreign trade barriers and policies?

28. When a single media firm gains access to a variety of program sources and distribution outlets, much in the press discussion focuses on the potential for the firm to realize "synergies" among its various holdings. It is suggested, for example, that a large media firm, after publishing a book, might be able to spin it off efficiently into a movie, a video release, and a TV show, then sell these products through the firm's international

distribution network.<sup>22</sup> In this case, such "synergies" may be gained from reductions in transaction costs or increases in marketing efficiencies.<sup>23</sup> Mergers and acquisitions are one way of creating such synergies, although some observers are skeptical whether these synergies actually exist.<sup>24</sup>

29. We seek comment on the "synergies" attainable from global media operations such as Time-Warner, News Corp., and Sony-Columbia. To what degree do such synergies differ from the economies of scope or scale discussed earlier? How will the advantages of such synergies, if they exist for firms with multiple holdings, affect the ability of smaller media firms to compete? In what ways do such synergies promote the trend toward mass media globalization? If such synergies do not exist, what is prompting the wave of consolidation among media firms?

30. Globalization may also reflect a firm's desire to minimize risks by, for example, controlling a reliable source of supply of a critical component or complement of a firm's principal product. Some claim that Sony's acquisition of Columbia Pictures was prompted by a desire to ensure access to programming—"software"—that is compatible with the hardware that Sony produces. The theory is that this will minimize the likelihood of another Betamax predicament for Sony, in which a line of Sony hardware—in that case, video cassette recorders and related equipment—eventually failed in the marketplace when, as a result of the greater popularity of the competing VHS format, programming became difficult to obtain in the Betamax format.<sup>25</sup>

Similarly, ensuring an adequate supply of high quality programming for cable systems is said to be a major

<sup>22</sup> L. Landro and D. Kneale, *Entertainment Giants Are Now All the Rage, But Is Big Any Better?* *Wall Street Journal*, Jul. 9, 1989 at A1.

<sup>23</sup> We recognize, of course, that a key to realizing such synergies would be control of the copyright for the subject material.

<sup>24</sup> J. Hammer, *The Myth of Global Synergy*, *Newsweek*, June 26, 1989, at 54.

<sup>25</sup> Some have referred to Sony's purchase of Columbia Pictures as making Sony more "vertically integrated". A firm is vertically integrated when it "performs consecutive processes i.e. different stages of production and/or distribution." See, e.g., *A New Dictionary of Economics* P. Taylor, Routledge & Kegan Paul, London, 1969, at 155. Under this definition, Columbia Pictures does not contribute to Sony's vertical integration because filmmaking is not a stage of producing electronics equipment. Parties are invited to comment on these terms and definitions, and to address the extent to which such distinctions (e.g. between vertical integration and investments in related, "adjacent" markets) affect their analysis of the policy issues addressed in this Notice.

<sup>21</sup> M. Porter, "Changing Patterns of International Competition", David Teece (ed.) *The Competitive Challenge: Strategies for Industrial Innovation and Renewal*. Ballinger Publishing Company, Cambridge, MA., 1987.

factor in the investments cable operators, such as TCI, have made in programming sources.<sup>26</sup> We request comment on the degree to which such risk minimization is a major factor motivating the global growth of media firms.

### C. Technology

31. Advances in technologies that aid in program production and information transmission, distribution, and storage have helped spur the globalization of media firms. In the transmission area, broader bandwidth technologies and increased capacity on satellites have fostered a dramatic increase in multichannel video services for consumers via cable television systems and direct broadcast satellite (DBS) service. Increased support in France and the United Kingdom for independent television, satellite, and cable TV systems has resulted in unprecedented choice for consumers and expanded market opportunities for program producers and distributors. Similarly, the future proliferation of programming services offering high definition video and digital audio, which require broader bandwidth, depend on advances in transmission technologies.<sup>27</sup>

32. The expansion of capacity for transmission and distribution of information created by new technologies has created a wealth of choices among media outlets for global firms. The availability and expected expansion of transmission capacity worldwide may give rise to new mass media services and new industry participants.

33. The changes brought about by advancing technology raise several questions. How have technological developments encouraged media firms to develop on a global scale? How have regulatory changes affected technological developments? Which regulations in the United States need updating to reflect technological change? How will new technologies, such as new forms of mobile communications, affect media companies and their product offerings? What other developing technologies could be useful to such companies in the future? What types of

<sup>26</sup> Such concerns are believed to figure in Turner Broadcast System's interest in acquiring MCM/UA. Less than two years after purchasing the MGM film library and other assets, Turner again is seeking to negotiate for MCM/UA's 1,000 remaining film titles and its TV and film production and distribution operations. See D. Mermigas, *Films Factor into TBS Pursuit of MGM/UA Electronic Media*, Dec. 4, 1989 at 2.

<sup>27</sup> DBS, which beams television signals directly to rooftop antennae, is the centerpiece of Japan's HDTV push for the 1990s.

technologies receive the greatest investments from media firms?

34. Even as technology has simplified the delivery of information by global media firms, the reduced cost of consumer electronic and storage equipment in the last decade has also given users increased options for their consumption of media programming. This has encouraged media companies to offer programs in a variety of formats. For example, *The Color Purple*,<sup>28</sup> originally a novel, has also been released as a movie, a video cassette tape, and a laser disk. In the future, companies such as News Corp. and Time-Warner—with holdings in print, programming, and distribution—may be able to offer all such formats from within the same corporate structure. Similarly, music entertainment is available on phonograph records, audio cassettes, compact discs, and digital audio tape. In addition, personal computers and modems have brought information services—from stock quotes to travel bookings—directly into the home. How have media firms responded to these technological changes? Are producers of video and audio programming drivers or followers of electronics technology? Can a company with program production, distribution, and manufacturing capabilities effectively control, or substantially influence, technological change through such vertical integration?

### III. Areas of Policy Inquiry

#### A. Domestic Media Structure

35. As discussed above, NTIA seeks comment on the implications of media globalization for U.S. mass media communications policy. In particular, we request comment on the impact, both positive and negative, of U.S. laws and regulations governing mass media on the ability of U.S. firms to compete with vertically integrated, international mass media firms. While we are focusing on communications policies, parties should feel free to comment on other policies, such as tax and trade issues, that may affect media firms.

#### 1. Cross Ownership and Multiple Ownership Regulations

36. The United States has many laws and regulations limiting cross-ownership and multiple ownership of domestic media properties. Though the Communications Act of 1934, as amended, (the Communications Act)<sup>29</sup>

<sup>28</sup> A. Walker, *The Color Purple*, Harcourt, Brace Jovanovich, Inc., San Diego, 1982.

<sup>29</sup> 47 U.S.C. 151 et seq.

does not contain express provisions limiting the concentration of domestic ownership or control in the commercial broadcasting service, the FCC has adopted regulations governing ownership of mass media facilities pursuant to its administrative discretion under the broad purposes of the Communications Act.<sup>30</sup> In promulgating cross-ownership<sup>31</sup> and multiple ownership regulations, the FCC sought to "promote maximum diversification of program and service viewpoints and to prevent undue concentration of economic power contrary to the public interest."<sup>32</sup> While the FCC has liberalized these rules on numerous occasions to respond to the growth and development of mass media services,<sup>33</sup> substantial ownership restrictions still remain an important feature of U.S. regulation of mass media services.

37. Cross-ownership regulations, for example, prohibit the common ownership or control of a daily newspaper and a broadcast station in the same geographic community.<sup>34</sup> FCC

<sup>30</sup> The Commission's first efforts at limiting the multiple ownership of broadcast facilities consisted of local and national restrictions adopted in the early 1940s. See *National Broadcasting Co., Inc. v. U.S.*, 319 U.S. 190 (1943). See also *U.S. v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

<sup>31</sup> While this Notice focusses on the potential effects of cross-ownership restrictions and national multiple ownership restrictions, it does not address other local broadcast ownership restrictions that limit combinations of broadcast stations in single communities, such as the "duopoly" rule, 47 CFR 73.355(a), which limits the ownership of broadcast stations in the same service (e.g., two FM stations) and the "one-to-a-market" rule, 47 CFR 73.355(b) which restricts certain radio/TV station combinations. Nevertheless, we invite parties to comment on whether those rules are relevant to this Inquiry, and, if so, the manner in which they are implicated by the globalization of mass media firms.

<sup>32</sup> Report & Order, Docket No. 14711, 29 Fed. Reg. 7535 (June 9, 1964), 2 R.R.2d 1588, 1591 (1964). See also Report & Order in Docket No. 8967, 9 R.R. 1563, 1568 (1953). The FCC, in adopting the "one-to-a-market" rule, based its decision in large part on First Amendment principles: that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public and basic to our form of government, and that free trade in ideas is beneficial to society. The FCC stated that these principles are "the wellspring, together with a concomitant desire to prevent undue economic concentration, of the Commission's policy of diversifying control of the powerful medium of broadcasting." 22 F.C.C.2d 306, 18 R.R.2d 1740 (1970).

<sup>33</sup> See e.g., Report & Order, Docket Nos. 20521, 20548, 78-239 and 83-46, 49 Fed. Reg. 19482, as corrected, 49 Fed. Reg. 36503, 55 R.R.2d 1465 (1984) (amendment of the multiple ownership attribution rules). See also Memorandum Opinion & Order, MM Docket No. 87-7, 54 Fed. Reg. 32639, 66 R.R.2d 1115 (1989). But see Order in Gen. Docket No. 83-1009, 49 Fed. Reg. 32,581, modifying Report & Order, Gen. Docket No. 8-1009, 56 R.R.2d 859 (1984) (adoption of current multiple ownership limits).

<sup>34</sup> 47 CFR 73.355(c).

rules permit broadcast television licensees to own cable television systems, and vice versa, but such licensees may not acquire common ownership of both a broadcast television station and a cable system in the same geographic community.<sup>35</sup> National television networks, such as ABC, CBS, and NBC, are effectively prohibited from owning cable television systems, and vice versa.<sup>36</sup> Telephone companies are generally prohibited from owning cable television systems in their operating areas,<sup>37</sup> and the RBOCs, which together serve more than 80% of the telephone subscribers in the country, are prohibited from owning cable television systems throughout the United States.<sup>38</sup>

38. In the United States, the "multiple ownership" of broadcast stations on a national scale is limited, while the ownership of multiple cable television systems, satellites, and Multichannel Multipoint Distribution systems (MMDS) is not. Generally, control or ownership of more than twelve television stations, twelve AM radio stations, or twelve FM radio stations is prohibited.<sup>39</sup> Similarly, ownership or control of television stations that have an aggregate national audience reach exceeding twenty-five percent is also generally prohibited.<sup>40</sup>

39. NTIA invites comments on these domestic regulations in light of the apparent trend toward globalization of media firms. Do these rules promote a healthy structure for the growth of our domestic mass media services? What is the effect of these regulations on U.S. media firms operating in a global market? Do any of these rules unnecessarily restrain the growth of domestic entities that would otherwise strive to become more globally competitive? Do these regulations channel the domestic investment of global media firms toward certain industries (e.g., print media, cable television, or satellite) to the exclusion of other industries such as broadcasting? Do the benefits of these rules, the promotion of diversity and competition in the domestic media marketplace, outweigh other global competitiveness considerations? Are these benefits even more important in today's media markets that are becoming increasingly

characterized by very large, very integrated global firms?

## 2. Vertical Integration

40. We have already discussed the possible role that the scope economies achievable through vertical integration may play in the trend toward the global growth of media companies.<sup>41</sup> NTIA seeks comment on the effects of current laws and regulations that limit or prevent the vertical integration of media forms.<sup>42</sup> We recognize that vertical integration issues arise in all aspects of the mass media industry, and encourage comments on all such circumstances. We discuss two examples of current vertical integration issues below.

### a. Financial Interest and Syndication Rules

41. The FCC adopted so-called "financial interest and syndication" rules in 1970 to promote creative diversity in television program production and to curb the perceived anticompetitive control of the television programming markets by the commercial broadcasting networks.<sup>43</sup> Essentially, the FCC was concerned with that because the three national broadcasting networks controlled most outlets for television programming (through affiliation with, or ownership of, broadcast television stations), the networks could exercise excessive bargaining power over non-network program producers.<sup>44</sup> Generally, the financial interest and syndication rules prohibit broadcast networks<sup>45</sup> from

<sup>41</sup> See *supra* paras. 26-27.

<sup>42</sup> The FCC is currently studying vertical integration in its pending proceeding examining competition, rate deregulation, and FCC policies relating to the provision of cable television service. See *Notice of Inquiry* in MM Docket No. 89-600, —FCC Red. — (Dec. 12, 1989). NTIA will examine the record developed on this subject in the FCC's proceeding. NTIA's Inquiry will analyze vertical integration as a phenomenon affecting the global growth of mass media firms generally, rather than only within the cable television industry.

<sup>43</sup> 47 CFR 73.658(j) (1)-(3). Also, in 1970, the FCC adopted the Prime Time Access Rule (PTAR), which prohibits networks from offering their affiliates in the top fifty markets more than three hours of programming during prime time [7:00-11:00 pm Eastern], subject to certain exceptions, such as for network news. 47 CFR 73.658(k). PTAR created a new market for syndicated programming as local affiliates gradually began to demand non-network programs from suppliers (other than the networks) to fill their needs during the period when network programming was unavailable.

<sup>44</sup> The networks would then be able to extract undeserved financial and syndication concessions from producers as a prerequisite to network exhibition.

<sup>45</sup> A "network," for these purposes, is defined as an entity "which offers an interconnected program service on a regular basis for fifteen or more hours per week to at least twenty-five affiliated television licensees in ten or more states." \* \* \* 47 CFR 73.658(j) (4). Television networks formed for the

acquiring any financial interest in the domestic exhibition, distribution, or other commercial use of any television program, unless the program was produced entirely by the network.<sup>46</sup> These rules apply only to the broadcast of television programs, since nonbroadcast rights, e.g., rights for cable and VCR, were exempted from the financial interest and syndication rules by the FCC in 1981.

42. In addition to the FCC's financial interest and syndication rules, network program production activities are further limited pursuant to a series of consent decrees<sup>47</sup> settling antitrust actions brought by the Department of Justice against the three networks ("Network Consent Decrees"). The provisions of these decrees generally enjoin ABC, CBS, and NBC from activities separately proscribed by the FCC's financial interest and syndication rules, set limits on the number of hours of network-produced programs,<sup>48</sup> and establish procedures for negotiations for program production contracts between the networks and independent program suppliers.

43. The financial interest and syndication rules have been the subject of extensive policy debate in recent

purpose of producing, distributing, or syndicating program materials for educational, noncommercial, or public broadcasting exhibition or uses are exempted from the rules.

<sup>46</sup> Among other things, the rules generally prohibit broadcast networks from selling, licensing, or distributing television programs to television station licensees within the United States for non-network television exhibition or otherwise engaging in the business commonly known as "syndication" within the United States.

A network also cannot sell, license, or distribute television programs of which the network is not the sole producer for exhibition outside the United States.

Networks are prohibited from reserving any option or right to share in revenues or profits in connection with such domestic and/or foreign sale, license, or distribution. In addition, they may not acquire any financial or proprietary right or interest in the exhibition, distribution, or other commercial use of any television program produced wholly or in part by a person other than the network, (except the license or other exclusive right to network exhibition within the United States and on foreign stations regularly included within such television network). See generally 47 CFR 73.658.

<sup>47</sup> *United States v. NBC*, 449 F. Supp. 1127 (C.D. Cal. 1978), *aff'd mem.*, No. 77-3381 (9th Cir. Apr. 12, 1978), *cert. denied*, 438 U.S.L.W. 3186 (1979); *United States v. CBS, Inc.*, Civil No. 74-3599-RJK (C.D. Cal. July 3, 1980), reprinted in 45 Fed. Reg. 34,463 (1980); *United States v. ABC, Inc.*, Civil No. 74-36000-RJK (C.D. Cal. Nov. 14, 1980), reprinted in 45 Fed. Reg. 58,441 (1980) (collectively cited herein as "Network Consent Decrees").

<sup>48</sup> Currently, under the decrees, the networks are permitted to own and produce up to 5 hours per week in prime time and 19 hours in daytime or fringe hours. These in-house production limitations in the decrees are scheduled to expire in November 1990.

<sup>35</sup> 47 U.S.C. 533; 47 CFR 76.501.

<sup>36</sup> 47 CFR 76.501.

<sup>37</sup> See 47 U.S.C. 533(b) and 47 CFR 63.54-63.58.

<sup>38</sup> This prohibition derives from the restrictions on RBOC provision of information services contained in the AT&T divestiture decree. See *United States v. Western Electric, et al.*, Civ. No. 82-0192, (D.D.C. Mar. 7, 1988), Slip. Op. at 2.

<sup>39</sup> 47 CFR 73.3555(d)(1)(ii).

<sup>40</sup> 47 CFR 73.3555(d)(2)(ii)

years. In June 1982, the FCC instituted a proceeding to consider the possible elimination of the rules, predicated upon findings of the FCC's Network Inquiry Special Staff, established in 1977 to conduct a thorough examination of network practices.<sup>49</sup> The FCC, noting that changing market conditions were rapidly increasing programming outlets (cable television, VCRs, subscription television, MMDS, etc.), requested comments on whether the financial interest and syndication rules were achieving their original purpose. In a tentative decision adopted in August 1983 the FCC proposed to delete the portion of the rules that prohibited networks from acquiring any financial interests in the commercial use of any television program not entirely produced by the network.<sup>50</sup> In response to Congressional concerns, the FCC placed a moratorium on further proceedings regarding the financial interest and syndication rules, and the FCC has not subsequently continued its proceedings on this subject. Nevertheless, the networks and program suppliers have conducted a series of negotiations on the subject of increased network involvement in program production. These attempts at an "industry compromise," however, have thus far not been productive.<sup>51</sup>

<sup>49</sup> Notice of Proposed Rule Making, BC Docket No. 82-345 (FCC 82-300), 47 Fed. Reg. 32959 (July 30, 1982). The FCC staff concluded the rules were unnecessary and counterproductive even when first adopted. It found that the networks did not possess market power in the programming market in 1970, and, as a result, they could not have engaged in the sorts of practices the financial interest and syndication rules were intended to prevent. The staff also concluded that the rules prevented networks and producers from efficiently sharing the risks of unsuccessful programs. This particularly disadvantaged small, independent program producers, thus threatening greater concentration in the program production market.

<sup>50</sup> Tentative Decision and Request for Further Comments, BC Docket No. 82-345 (FCC 83-377), 48 Fed. Reg. 38020 (Aug. 22, 1983). In addition, the FCC proposed to continue to prohibit network participation in the domestic syndication of prime time entertainment programming, and to modify the syndication rules in two other respects. First, any rights that the network acquired affecting the syndication of a program would have to be transferred to an unaffiliated syndicator and the program made available for syndication within six months after the end of the network exhibition run. Second, for series that run for more than five years, the network would have to make the series available for syndication at the end of the fifth year of network exhibition.

<sup>51</sup> The impending expiration of some of the provisions of the Network Consent Decrees (including the limits on in-house production by the networks) in 1990 has served as a catalyst in stimulating increased activity in these negotiations in recent months.

44. Proponents of the financial interest and syndication rules contend that the rules effectively serve the public interest by promoting economic competition and diversity in program production and distribution markets. They argue that repeal of the rules would result in increased network dominance in those markets to the detriment of independent program suppliers, independent television broadcast stations, and the television viewing public. The continued availability of high quality programming on network television is said to result from the existing economic structure, in which the risks of economic losses that may be incurred by independent producers in the continued development and production of television programming are offset by the incentives of realizing high returns in the syndication of programming after successful network presentation.<sup>52</sup> These parties argue that, despite the growth of alternative outlets for video entertainment, the networks remain "bottlenecks" in the distribution of television programming, particularly "prime-time" programming, i.e., high quality (and high cost) drama and comedy shows. They also recite the significant positive trade balance the U.S. enjoys in television programming as evidence that the rules have fostered a highly efficient, internationally competitive programming industry.<sup>53</sup>

45. Opponents of the financial interest and syndication rules contend that the relative strength of broadcast television networks in today's media marketplace, with the development of cable television, VCRs, a strong independent television industry, and competing network-like entities, is significantly less today than when the rules were adopted in the early 1970s. They argue that the rules unfairly deny networks the most substantial economic rewards—syndication royalties—for innovative programming ventures, and inhibit their ability to compete in the domestic marketplace against competitors that are not subject to similar rules, such as cable television firms.

46. Moreover, some argue that, despite the positive net balance of trade for the United States in programming

<sup>52</sup> See H. N. Brook in *Television Syndication: A Practical Guide to Business and Legal Issues*, Los Angeles County Bar Association 30 (V.S. Van Patten ed. 1987).

<sup>53</sup> See Testimony of Mr. Jack Valenti, Chairman, Motion Picture Association of America, before the House Subcommittee on Telecommunications and Finance, Committee on Energy and Commerce, Hearings to Examine the European Community's Proposed Broadcast Directive, July 28, 1989. According to Mr. Valenti, the U.S. enjoys a 2.5 billion worldwide surplus in the trade of films.

production, the rules hamper U.S. competitiveness in the global media marketplace. Because the rules limit network program production for the domestic market, it is argued that the incentives for network program production for international distribution are greatly diminished. In contrast, other firms in competition with the networks in both the domestic and international media marketplaces do not face similar restrictions.

47. More generally, it is argued, these rules permit foreign firms to make investments and acquisitions in this country that are foreclosed to the broadcast networks, impeding the networks from moving into different, but related, markets where they could be efficient competitors. Sony's purchase of Columbia Pictures, News Corp.'s acquisition of Fox Films, and Television South's acquisition of MTM Enterprises are cited by some as examples of foreign-based firms having greater flexibility to compete in programming markets than the U.S.-based broadcast networks.<sup>54</sup>

48. We seek comment on the implications of the globalization trend for the FCC's financial interest and syndication rules.<sup>55</sup> Does the globalization trend alter the justification for maintaining financial interest and syndication rules? If so, does it heighten or lessen the need for such rules? What is the effect of the rules on the ability of commercial broadcast networks and independent program producers to compete with global media firms? Do these rules promote U.S. global competitiveness by creating a marketplace environment in which independent program producers can fully and vigorously compete, resulting in a television programming industry that is the strongest in the world? In the alternative, do the rules restrict domestic competition and investment,

<sup>54</sup> "World Watching at NATPE," *Broadcasting*, Jan. 8, 1990, 66. One television network chairman recently was reported to claim, "the rules that keep the networks from syndicating shows also make it almost impossible for them to buy a studio." See Grover, R., "Shootout on Hollywood and Vine," *Business Week*, Jan. 8, 1990, 3.

<sup>55</sup> We note that Fox Broadcasting filed a Petition for Rulemaking and Request for Waiver with the FCC on January 30, 1990, which, *inter alia*, asks the Commission to initiate a broad rulemaking on the financial interest and syndication rules. See Public Notice, FCC No. 1591 (Feb. 2, 1990) (soliciting public comment on the Fox Petition). The inquiry we are initiating today does not encompass all the broad issues raised in the Fox petition. Rather, this inquiry focuses on the effects the financial interest and syndication rules have on domestic networks, program producers, and other industry participants in the context of the globalization of the mass media industry.

thereby permitting inefficiencies among program producers that ultimately reduce what could potentially be an even stronger U.S. programming industry? Are any changes in these rules warranted in light of current and projected developments in mass media markets? If so, what changes should be made?

#### *b. Vertical Integration in the Cable Television Industry*

49. In contrast to the restrictions discussed above on broadcast networks, which limit their ability to expand either horizontally (through station acquisition) or vertically (through program production), there are no comparable restrictions on cable operators or networks, which can acquire, merge with, and invest freely in other cable systems, cable networks, and cable program production. Some observers have expressed the concern, however, that recent mergers or combinations of companies operating in various parts of the cable industry portend adverse concentrations that could undermine competition and reduce the diversity of information and entertainment sources.<sup>56</sup> These observers note that a few large, vertically integrated cable firms increasingly control large segments of the domestic media marketplace, and may exert their market power to the ultimate detriment of U.S. consumers.

50. Legislation was introduced in the first session of the 101st Congress to address vertical integration in the cable television industry, including the Cable Television Consumer Protection Act of 1989 (S. 1880),<sup>57</sup> which addresses a broad range of issues associated with the growth of the cable television industry following the passage of the Cable Communications Policy Act of 1984 (Cable Act).<sup>58</sup> S. 1880 includes three provisions arguably related to vertical integration in the cable television industry: (1) A requirement that cable programmers not discriminate in terms and conditions in the sale of programming to competing delivery systems; (2) rules governing the carriage of local broadcast television signals on cable systems pursuant to "must carry" rules, which would require cable

operators to comply with those rules in order to receive the benefits of the cable compulsory copyright license;<sup>59</sup> and (3) limitations on the acquisitions of cable television systems by Multiple System Operators to prohibit concentrations in excess of 15 percent of the nation's cable subscribers.<sup>60</sup>

51. In response to these Congressional concerns, the FCC is examining the degree of vertical integration in the cable television industry pursuant to its obligations under section 623(h) of the Cable Act.<sup>61</sup> As part of that proceeding, the FCC intends to examine the state of vertical integration of cable television operators and cable programming services, the extent to which cable operators favor their own services on their cable systems, the effect of vertical integration (as distinct from horizontal concentration) on the number of programming services and the availability of such services to rival delivery systems, and other costs or benefits to consumers of vertical integration in the cable television industry.<sup>62</sup>

52. NTIA explored the issues of growing concentration of control and vertical integration in the cable television industry in its *Video Study*, which found that common ownership between programming services and cable systems appeared to be producing substantial benefits,<sup>63</sup> while not

<sup>56</sup> See 17 U.S.C. 111.

<sup>57</sup> Other provisions of S. 1880 include a new definition of "effective competition" within the meaning of 47 U.S.C. 543(b)(2)(A) of the Cable Act, which determines when cable systems can be subject to local rate regulation; changes to existing local franchising procedures to create the opportunity for competing applications and comparative renewal proceedings; limitations on the liability of franchising authorities for monetary damages resulting from First Amendment violations during the franchising process; and a provision allowing franchising authorities to require cable systems to impose programming obligations (for broad categories of programming only).

<sup>58</sup> Public Law No. 98-549, 98 Stat. 2780, codified in Title VI of the Communications Act, 47 U.S.C. 543(h). Congress directed the FCC to conduct a study of the cable industry's operations under the Cable Act and, based on that study, to prepare and submit to Congress a report analyzing the effect on the video services marketplace of substituting market forces for cable rate regulation and, if appropriate, to recommend legislation. The Cable Act requires the report to be completed by October 28, 1990, but the FCC has announced its intent to complete its study by July 31, 1990.

<sup>59</sup> See *Notice of Inquiry*, *supra* note 42, Par. 65. See also *Notice of Proposed Rulemaking*, MM Docket No. 90-4 (FCC 90-12), FCC Rcd. \_\_\_\_ (Jan. 22, 1990).

<sup>60</sup> See *Video Program Distribution and Cable Television: Current Policy Issues and Recommendations*, 90 (June, 1988). These benefits include the ability of vertically integrated firms to avoid transaction costs in obtaining programming, and the expanded diversity of viewing choices for subscribers made available through investment by

adversely affecting the supply of cable programming or the diversity of viewing choices for cable subscribers.<sup>64</sup> At that time, NTIA concluded that there was no reason to prescribe corrective action concerning existing levels of vertical integration within the cable industry.<sup>65</sup> While we are addressing other aspects of U.S. cable policy in our Infrastructure Study,<sup>66</sup> we request comment on whether global conditions in the mass media industry have altered the facts leading to these conclusions on vertical integration in the cable industry.

#### 3. Foreign Ownership Rules

53. Section 310(b) of the Communications Act prohibits aliens or corporations organized under the laws of foreign governments from acquiring a broadcast or common carrier radio license.<sup>67</sup> Also, aliens may not be officers or directors of a corporate licensee. However, section 310(b) permits aliens, their representatives, or foreign governments to acquire up to one fifth of a corporate licensee's stock. In addition, aliens may comprise up to one fourth of the directors, or own up to one fourth of the stock, of a corporation that controls a corporate licensee.

54. In light of the continued trend toward global growth of media firms, NTIA seeks comment on the costs and benefits of these restrictions. How have they affected foreign investment in media firms? Should the provisions of section 310(b) be liberalized on the basis of investment access offered to U.S. firms abroad, i.e., if a foreign government permits U.S. investors to own and control radio or television distribution facilities within its borders, should the U.S. provide comparable access?

55. The foreign ownership restrictions of section 310(b) are generally not applicable to media firms that do not hold FCC broadcast or common carrier radio licenses. This means that aliens or corporations organized under the laws of foreign governments may acquire control of other types of entities with

cable companies in helping to create new, or preserve existing (but financially strapped), programming sources. *Id. at 90.*

<sup>64</sup> *Id.* at 102.

<sup>65</sup> *Id.* at 106. However, NTIA noted that the trend towards increased concentration of ownership among cable operators may adversely affect the diversity of programming available to the public, and NTIA recommended that the FCC initiate an inquiry to evaluate the effects of cable ownership concentration on diversity.

<sup>66</sup> Notice of Inquiry, Docket No. 91296-9296, Comprehensive Study of Domestic Telecommunications Infrastructure, 55 FR 800 (Jan. 9, 1990).

<sup>67</sup> 47 U.S.C. 310(b).

<sup>56</sup> See e.g., Opening Statement of Senator Howard M. Metzenbaum, Senate Judiciary Committee, Subcommittee on Antitrust, Monopolies and Business Rights, Hearing on Competitive Problems in the Cable Television Industry, Apr. 12, 1989.

<sup>57</sup> See S. 1880, 101st Cong., 2d Sess. (1989) (introduced by Senator Danforth on November 15, 1989). See also Cable Television Subscriber Protection Act, S. 833, 101st Cong., 1st Sess. (1989); H.R. 109, 101st Cong., 1st Sess. (1989).

<sup>58</sup> Pub. L. No. 98-549, 98th Cong., 2d Sess. (1984).

program distribution capabilities, including cable television systems, theater chains, print media, etc., so long as those entities do not maintain FCC broadcast or common carrier licenses. What is the significance of this disparity in the restrictions on foreign ownership and investment in the Communications Act? What effects, if any, does this disparity have on the manner in which the globalization trends in mass media industries discussed in this Notice are reflected in U.S. markets?

#### 4. General Antitrust Issues

56. Federal and state antitrust laws are designed essentially to promote economic competition and efficiency. The relevant federal statutes establish very broad principles that are enforced through criminal and civil law suits as well as actions by independent agencies such as the Federal Trade Commission. The antitrust laws have played an important role in defining the mass media marketplace. For example, under these laws, five major motion picture companies were required to divest ownership of over 1100 movie theaters,<sup>68</sup> broadcast networks were subjected to extensive financial and syndication rules,<sup>69</sup> and the RBOCs have been prohibited from offering content-based services such as video programming.<sup>70</sup> Similarly, media firms have relied on these laws in contesting allegedly anticompetitive activities by their competitors.<sup>71</sup> According to some industry observers, the antitrust laws may play an increasingly important role in this regard in the 1990s, in light of the trend toward intermedia competition.<sup>72</sup>

57. Does the current application of antitrust laws unreasonably restrain the ability of domestic firms to merge, acquire, or enter into joint arrangements with other firms in order to enhance their global competitiveness?<sup>73</sup> If so,

what specific revisions are warranted in an era of global competition, and what protections should be retained or added? Conversely, is there now a need for new or additional protections in the domestic media marketplace to prevent concentrations of ownership and control detrimental to competition? Should the FCC have the authority to address antitrust concerns more explicitly in its regulatory activities? Is there a conflict between the goal of promoting competition in the domestic media marketplace and the goal of promoting global competitiveness of U.S. media firms? We solicit specific proposals that address this balance and that would permit U.S. firms to acquire additional strengths to compete globally, while protecting competition in the domestic marketplace.

#### B. Globalization and Media Content Policies

58. The trend toward the globalization of mass media is seen by some as leading inevitably to a new world order in which the significance of political borders, national identities, and regional and cultural differences is diminished through information and entertainment distributed by global firms.<sup>74</sup> According to this scenario, experiences shared on a global scale through communications media will eventually transcend differences among citizens of separate nations or regions within a nation. Some observers contend these visions are increasingly becoming reality, and they identify recent developments in the Soviet Union, Eastern Europe, and China as responses to images of freedom, dignity, and prosperity transmitted by "penetrating networks" of mass media and telecommunications.<sup>75</sup>

59. While U.S. mass media policies have embraced many traditional values that are seemingly consistent with this new order, other values may be somewhat challenged by such developments. For example, the domestic policy of promoting a diversity of voices in mass media has long been linked to the First Amendment as a

are these arrangements efficient and procompetitive, and in what circumstances are they unduly restrictive and anticompetitive? How would such an antitrust analysis apply to mass media markets, and how does the apparent trend toward globalization have on the analysis?

<sup>74</sup> As far back as a generation ago, some futurists were predicting that developments in mass media communications would lead to such radical transformations and the development of a world that was increasingly a "global village." See M. McLuhan, *Understanding Media: The Extensions of Man* (1964).

<sup>75</sup> See Bagdikian, "The Lords of the Global Village", *The Nation*, June 12, 1989, 805.

means of promoting pluralism and free speech values—values that ultimately promote "content openness."<sup>76</sup> However, the growth of global media and the development of "content openness" worldwide may have a significant impact on other content related media policies, such as the policy of localism, the appropriateness of "cultural sovereignty" concerns for the U.S. and foreign nations, and the future role of U.S. public broadcasting.

#### 1. Localism

60. U.S. telecommunications policy has long embraced "localism" as a fundamental policy in domestic broadcasting. Various Federal laws and regulations require broadcast licensees (but not other domestic transmission media such as cable television systems, MMDS providers, or DBS licensees) to serve designated "communities of license" by determining the needs of local audiences and providing responsive programming. For example, broadcasters are required to keep quarterly lists of the issues of importance to their communities of license that received significant treatment and to include examples of responsive programming.<sup>77</sup> Moreover, broadcast licensees generally must maintain adequate signal coverage of their communities of license throughout the duration of their licenses, regardless of growth trends in population distribution.<sup>78</sup> In addition, section 307(b) of the Communications Act creates an assignment criterion for broadcast licenses that promotes local broadcast service to as many communities as practical.<sup>79</sup>

<sup>68</sup> See section III-C, *infra*, which notes that such policies have produced many positive effects. In this section, we seek comment on the effects of the globalization trend on traditional media content policies to develop a record regarding the importance of these policies and their relationship to other policies. In this regard, NTIA solicits recommendations on how best the U.S. government can promote diversity and "content openness" on a global scale. We seek comment on whether policies that would promote U.S. ownership of international and foreign communication facilities (e.g., a cable system or a broadcast station) would also significantly increase the degree of global content openness.

<sup>77</sup> See 47 CFR 73.3526(a)(8), (9).

<sup>78</sup> See e.g., 47 CFR 73.315(a).

<sup>79</sup> 47 U.S.C. 307(b) provides that "in considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

<sup>66</sup> *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

<sup>69</sup> See cases cited *supra* note 47.

<sup>70</sup> See *United States v. Western Electric, et al.* Civ. No. 82-0192, (D.D.C. Mar. 7, 1988). Slip. Op. at 2.

<sup>71</sup> *Viacom International, Inc. v. Time Inc.*, No. 89-CIV-3139 (JMW) (S.D.N.Y. filed May 9, 1989).

<sup>72</sup> See Gillmor, Barron, Simon and Terry, *Mass Communication Law* (5th ed. 1989) at 541. "While newspapers once competed only with newspapers, radio stations only with radio stations, magazines only with other magazines, etc., the trend now is toward intense intermedia competition, both for the attention of readers, listeners, and viewers and for advertising dollars." *Id.*

<sup>73</sup> As with many of the FCC's rules on media industry structure, much of the antitrust activity in the mass media area has tended to focus on vertical arrangements, e.g., relations between program supply and program distribution, providers of "content" and providers of "conduit." What is current antitrust theory on the costs and benefits of such vertical arrangements? In what circumstances

61. While this federal policy of "localism" is principally a part of broadcast regulation, cable television systems often have local programming requirements imposed on them pursuant to state or local franchises. The Cable Act authorized local franchising authorities to insert public, educational, or governmental access channel requirements in cable television franchises.<sup>80</sup> Many local authorities have opted to establish such requirements. These access channels often provide programming to cable subscribers with a uniquely local orientation.

62. Apart from governmental laws and policies promoting localism, market forces have also led domestic media to focus on local audiences with at least part of their programming. Advertisers often desire coverage of important local events through local news and sports programming by broadcasting, cable, and other media, because such coverage attracts local audiences. As a result, in many communities local stations compete vigorously with each other in terms of the quality and quantity of their local news programming. Furthermore, original local programming is beginning to be provided by some cable television operators on their systems.<sup>81</sup>

63. Of what importance is the policy of localism in the contemporary media marketplace, and how should this policy be treated in an era of globalization and increasingly international ownership of media firms? Will the global growth of media firms affect the traditional commitment of domestic media firms to the needs of local audiences? If so, how, and to what extent? In particular, will the globalization trend have a specific impact on the quantity or quality of local programming presented by broadcasters? Should "local service" be a continuing obligation of all broadcast licensees? Do foreign governments actively promote "localism" in their telecommunications regulatory regimes?

## 2. Cultural Sovereignty

64. To date, the United States has not embraced governmental policies aimed at preserving U.S. cultural values, or "cultural sovereignty," in the domestic media marketplace. Nevertheless, as discussed above, foreign investment in domestic media firms has experienced dramatic growth recently. Reacting to

this trend, Members of Congress and the press have expressed concern over increasing foreign ownership of U.S. motion picture production studios, recording companies, and publishers.

65. In contrast to the United States, foreign governments frequently express concerns about preserving cultural sovereignty in their mass media policies, often treating program imports on the basis of country of origin. For example, the Commission of the European Community (EC) recently approved a Broadcasting Directive containing requirements designed to ensure that a majority of television shows aired in the EC are also produced there.<sup>82</sup> According to Francois Mitterand, one of the main reasons for the EC to establish these requirements is to preserve European cultural identity.<sup>83</sup>

66. We note that other countries also express "cultural" concerns about U.S. exports of programming. For example, Article 2005 of the U.S.-Canada Free Trade Agreement contains a blanket exemption for "cultural industries" (mass media) at the insistence of Canadian negotiators.<sup>84</sup> In addition, Canada's mass media laws and regulations contain certain restrictions on non-Canadian mass media that ostensibly reflect its desire to protect Canadian culture from undue foreign influence, particularly from the United States.<sup>85</sup> What should the U.S. response be to such policies of cultural sovereignty in foreign countries? What are the effects of cultural sovereignty policies on the content of programming supplied by global media firms? What will be the effects of the EC Broadcasting Directive on the programming content of media firms, including global firms, doing business in

<sup>80</sup> 47 U.S.C. 531.

<sup>81</sup> See *Petition for Rulemaking and Supplemental Statement in Support of Petition for Notice of Inquiry* filed at the FCC by the Association of Independent Television Stations, October 23, 1989, incorporated by reference in the FCC's *Notice of Inquiry* in MM Docket No. 89-600, *supra* note 42 at para. 9.

<sup>82</sup> The Directive, entitled "Television Without Frontiers", is effective October 1991. In addition to these requirements, the Broadcasting Directive also contains content guidelines: member nations may ban television programs that, in their view, depict excessive violence, explicit sexual material, or encourage racial tension and other prejudices. See *Official Journal of the European Communities*, No. L 298/23 (Oct. 17, 1989), "Council Directive of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities" (89/552/EEC).

<sup>83</sup> P. Revzin, *The Battle for Europe's TV Future*, Wall Street Journal, October 6, 1989, at B1. Opponents of the Broadcasting Directive, including U.S. Government officials and the U.S. motion picture industry, challenge this characterization of the Directive, arguing that it has little to do with European culture, and is instead a form of economic protectionism.

<sup>84</sup> See *Communication from the President of the U.S. Transmitting the Final Legal Text of the U.S.-Canada Free-Trade Agreement*, H. Doc. No. 100-216, 100th Cong., 2d Sess. (1988), 229.

<sup>85</sup> See V. Sears, "The Future of Broadcasting" (3 pt. series), *Toronto Star*, Dec. 16-18, 1989.

the EC? What effect will increasing consumer demand for programming generated by the new global media firms in Western Europe have on the effectiveness of the Broadcasting Directive?

## 3. Public and Non-Commercial Broadcasting

67. U.S. non-commercial broadcasting began in the first quarter of this century, and, in the following years non-commercial broadcasting continued to grow as the FCC reserved channels exclusively for non-commercial use in both the FM radio service and the television service. However, the most significant stimulus for growth of non-commercial service was the creation of public broadcasting in 1967.<sup>86</sup> Over the years, public broadcasting has sought to provide a variety of informational, educational, and entertainment programming of a type not generally available in the marketplace to millions of listeners or viewers via more than 300 television broadcasting stations and more than 300 radio stations.

68. In part, non-commercial and public broadcasting grew out of concerns regarding the content of programming produced in response to marketplace incentives.<sup>87</sup> As media firms globalize, audiences in the U.S. may receive greater diversity in programming, particularly from foreign, non-commercial sources. In recent years, some observers have begun to question the uniqueness of U.S. non-commercial or public television programming, noting the variety of choices commercially available in today's marketplace, including domestic and foreign-produced cultural, scientific, and other public-television-like programming on cable television systems, that previously was unavailable to U.S. viewers.

<sup>86</sup> While the origins of non-commercial broadcasting may be traced back to 1917, it was not until 1967 that the Carnegie Foundation issued its report calling for the creation of a non-profit corporation to encourage the development of non-commercial television, which led ultimately to the enactment of the Public Broadcasting Act of 1967, 47 U.S.C. 390-401. The Public Broadcasting Act created the Corporation for Public Broadcasting to allocate federal funds to various public broadcasting activities.

<sup>87</sup> Indeed, John Macy, Jr., the first president of the Corporation for Public Broadcasting, adopted former FCC Chairman Newton Minnow's 1961 characterization of television program content as a "vast wasteland" in his book describing the creation of the U.S. public television service. In discussing the goals of public broadcasting, he wrote, "the landscape could be planted with program substance that would enhance learning," and viewer passivity would be "overcome by provocative and topical images that raise interest and promote involvement." See J. Macy, Jr., *To Irrigate a Wasteland* (1974), 2.

69. Accordingly, NTIA seeks information regarding the potential impact of mass media firm globalization on the availability of public or non-commercial programming in the United States. To what extent has public broadcasting influenced and shaped the development of U.S. television and radio, and should its role remain the same as domestic and international media firms become global in nature?<sup>88</sup> Should the United States look to the experiences of other nations in assessing the role of public broadcasting in an era of globalization?

*C. Globalization and the International Promotion of Democratic Ideals and Free Speech*

70. Global electronic media and technology may play an increasingly significant role in promoting free speech and fostering demand for democratic reforms internationally. The development of global media has made it more difficult for nations to enforce policies of censorship and limit their citizens access to information. In particular, it appears that free-world media has been able to penetrate closed societies and influence reform movements and political events within those societies. Indeed, some claim that a principal reason prodemocracy movements in Eastern Europe were able to spread so rapidly, was that citizens in each nation were able to learn through media reports of the successes of reform efforts in neighboring nations.<sup>89</sup> In this part of our inquiry, we wish to examine this apparent relationship between "globalization" of media and "liberalization" of political regimes worldwide.

**1. The Role of Private Sector Media Firms**

71. U.S. popular culture has great international influence. Films, news, TV entertainment, music, and advertisements that originate in the United States are disseminated worldwide and can shape opinions and behavior in other countries.<sup>90</sup> Many of

<sup>88</sup> We note that there are continuing debates regarding the appropriate structure and sources for the funding of public broadcasting. We seek comment on whether the subjects addressed in this inquiry relate to the subject of continuing governmental funding for public broadcasting?

<sup>89</sup> For example, the people of Romania were informed of internal events and changes in neighboring countries through U.S., British, West German, and French radio broadcasts. B. Harden, *Shortwave Radio Shaped the Revolution*, Washington Post, Dec. 29, 1989 at 1. See also *supra* note 3.

<sup>90</sup> Cable News Network is now available in 89 foreign countries. Its reach is becoming so pervasive that it reportedly is becoming a preferred vehicle for

these media, deliberately or incidentally, express values, tastes, and political perspectives that may reflect democratic ideals and encourage a thirst for freedom. Some argue that, without overtly advocating any particular political or economic system, private media, by displaying the quality of life in the U.S. and other democratic, free market countries, raise viewers' expectations in Eastern Bloc and other non-democratic countries. To what extent has the dissemination of such information resulted in social or political reforms in other countries?

72. Recent press accounts indicate that the opportunities for private sector firms to distribute free-world programming in many countries without a free-speech tradition, particularly in the Eastern Bloc and the Soviet Union.<sup>91</sup> For example, Turner Broadcasting System (TBS) is reported to have reached an agreement with Viet Nam for the distribution of Cable News Network International (CNN-I) in Viet Nam in exchange for monetary compensation and a promise from the Vietnamese government to contribute news programming to the CNN-I World Report.<sup>92</sup> Moreover, four American partners have entered into a joint venture with ministries of the Polish government to construct the cable television systems in Warsaw and Krakow that will include U.S. cable television networks on a premium subscription basis.<sup>93</sup> Also in the private sector, the U.S. Public Service Satellite Consortium is reported to have agreed with the Soviet State Committee for TV and Radio Broadcasting to permit increased access by U.S. radio programmers through the exchange of radio programs from Soviet and U.S. sources via satellite on a regularly scheduled basis.<sup>94</sup>

73. NTIA seeks comment on the extent to which the information carried by private sector media firms promotes democratic ideals and free speech worldwide. How extensive are the

governments to gather information on developments in other countries and even to communicate with one another in certain circumstances. See "Ted Turner's CNN Gains Global Influence And 'Diplomatic' Role", *Wall Street Journal*, Feb. 1, 1990, 1.

<sup>91</sup> Nika TV, an independent Soviet television company, is reported to be planning to distribute television programming, including 5,000 U.S. films, separate from the official state-operated television service, in several provincial cities within the Soviet Union. See *Wall Street Journal*, *World Wire*, Oct. 16, 1989, at A10.

<sup>92</sup> See *Communications Daily*, Jan. 5, 1990, p. 6.

<sup>93</sup> E. Schatz, *Eastern Bloc Pay TV: For a Few Dollars More*, *Multichannel News*, Oct. 16, 1989, at 31.

<sup>94</sup> *Communications Daily*, Sep. 1, 1989, 5.

effects of the private media industry's activities in, for example, Eastern Europe, Asia, Latin America, and Africa? How does the provision of news and entertainment programming promote social and political reforms in these regions? To what extent, and by what means, do countries censor the content provided by global media firms? How would increased access by free-world media firms further the achievement of democratic goals and free speech within the Soviet Union and other Eastern Bloc countries? Should the U.S. government take additional steps to maximize the opportunities for U.S. and other Western programmers to distribute programming in these and developing countries? If so, what steps would be most effective both in the short term and in the long term?

74. A significant amount of international distribution of news and information takes place through short and medium wave broadcasting facilities. While many of these services are operated by government entities, some are privately owned. For example, there are at least nineteen privately-owned international broadcast stations licensed by the FCC<sup>95</sup> that provide service worldwide.

75. What role do such private shortwave stations play in promoting democratic ideals and free speech worldwide including those based in other countries as well as in the United States? What types of programming and information do they provide? What impediments do these stations face in gaining access to foreign audiences, and how could government be of assistance?

**2. The Role of Public Sector Entities**

76. Distinct from the private sector firms discussed above, "public sector" entities are also important sources of international media programming. The United States Information Agency (USIA) and the Board for International Broadcasting (BIB) are the primary U.S. agencies with responsibilities for providing and coordinating international broadcasting on behalf of the U.S.

<sup>95</sup> As of December, 1989, these stations included: KHBI, Agincourt Point, Saipan, Northern Mariana Islands; WRNO, New Orleans, Louisiana; WINB, Red Lion, Pennsylvania; WYFR, Okeechobee, Florida; WMLK, Bethel, Pennsylvania; KCBI, Denton, Texas; KVQH, Rancho Simi, California; KHBN, Piti, Guam; KSDA, Agat, Guam; KTWR, Agana, Guam; WHRI, Noblesville, Indiana; WCSN, Scotts Corners, Maine; KUSW, Salt Lake City, Utah; WSHB, Furman, South Carolina; WWCR, Nashville, Tennessee; KJES, Vado, New Mexico; NDXE, Opelika, Alabama; WRNO, New Orleans, Louisiana; and a newly licensed station in Honaunau, Hawaii.

government.<sup>96</sup> USIA administers the Voice of America (VOA) and the Worldnet satellite television system, among other things. BIB supports the operation of Radio Liberty/ Radio Free Europe, which are federally funded not-for-profit corporations, and provides administrative and managerial oversight to their operations.<sup>97</sup> In recent weeks, broadcasts from the VOA and RFE have been directly linked with spreading information that helped further democratic reforms in Romania.<sup>98</sup>

77. In the past, deliberate jamming by governments hostile to the content of broadcasts from foreign facilities impeded U.S. and other international broadcasting services.<sup>99</sup> However, for the first time in over 35 years, the Soviet Union has recently ceased jamming of Radio Liberty's shortwave broadcasts.<sup>100</sup> Also, jamming of Radio Free Europe's broadcasts into Eastern Europe, as well as those of Deutsche Welle<sup>101</sup> into Bulgaria, and Kol Israel<sup>102</sup> into the Soviet Union have ceased.<sup>103</sup> This welcome cessation of

<sup>96</sup> In addition, the Armed Forces Radio and Television Service (AFRTS) distributes radio and television programming in 56 foreign countries, in more than 800 locations. While many of AFRTS's operations are limited closed circuit distribution facilities on military bases, it also operates broadcast facilities and networks that may be received off-air by local civilian populations in regions surrounding U.S. armed forces deployments in foreign countries.

<sup>97</sup> While such entities as Radio Liberty and Radio Free Europe are not agencies of the U.S. Government, we refer to them as "public sector" because of their federal funding and close association with the U.S. Government.

<sup>98</sup> See Communications Daily, Jan. 4, 1990, at 7.

<sup>99</sup> See NTIA Reports 85-187; 86-206; 87-213; 89-244 (Monitoring of Harmful Interference to the HF Broadcasting Service during selected periods). Jamming essentially involves the transmission of a countersignal designed to interfere with clear reception of an international broadcast signal. Jamming activities constitute violations of the International Covenant on Civil and Political Rights (1966), the Helsinki Final Act (1975), the United Nations Declaration of Human Rights (1948), and Article 48 of the International Telecommunications Convention.

<sup>100</sup> The Soviets stopped their jamming of Radio Liberty in December, 1988.

<sup>101</sup> Deutsche Welle, the shortwave service of the Federal Republic of Germany, broadcasts programs in 34 languages.

<sup>102</sup> KOL Israel, the Voice of Israel, offers shortwave programming in more than 14 languages and is operated by the Israel Broadcasting Authority.

<sup>103</sup> However, the world is not totally free of jamming of international broadcasting services. For example, services such as the Voice of America's Dari and Pashto languages, broadcast near Afghanistan, continue to be adversely impacted by intentional harmful interference. See *Monitoring of Harmful Interference to the HF Broadcast Service: IV. Results of the July 1988 Coordinated Monitoring Period*, NTIA Report 89-244, June, 1989. 1. NTIA seeks comment on the existence of other significant geographic regions that may remain relatively closed to free-world media. Of these regions, what

jamming may be the result of recent improvements in East/West relations. However, it raises questions regarding the maintenance of U.S. readiness to respond to jamming if it resumes. Should the United States continue to maintain its ability to counter jamming activities through maintenance of flexible frequency assignments? In light of this new era of apparent openness and cessation of jamming, what steps should the United States take, or continue to take, to monitor jamming activities?

78. The International Telecommunications Union, at its June 1989 Plenipotentiary Conference in Nice, resolved to schedule a World Administrative Radio Conference for dealing with matters connected with the broadcasting service in the HF Band (1993 HF WARC) in the first quarter of 1993.<sup>104</sup> NTIA anticipates that some parties may argue for a cut-back in public sector short and medium-wave broadcasting due to the increase in private media firms and improvements in receptivity in many geographic regions, while others may call for increased public sector activities in these areas. Accordingly, we invite comment on these arguments and on other subjects pertaining to the globalization of media that may be relevant to U.S. preparation for 1993 HF WARC. To what extent does the reduction in deliberate jamming activities underscore the need to seek improvements in other sources of interference in the HF service.<sup>105</sup>

### 3. The Role of Technology

79. Recent events suggest that government control or censorship of information is becoming increasingly less effective in some nations because pervasive media and consumer electronics technologies are less susceptible to governmental control. Consequently, information is transferred and communications occur despite policies of suppression, thereby heightening the visibility of both reform movements and oppressive foreign government activities. NTIA seeks comment on the significance of various media and consumer electronic technologies in promoting free speech and democratic ideals worldwide.

regions do not receive broadcast service from U.S. public sector sources? Should public sector sources be allocated to these regions, and on what basis should the selection of such regions be made?

<sup>104</sup> See *Final Acts of the Plenipotentiary Conference*, Nice, 30 June 1989, Res. No. P1-B/1.5.

<sup>105</sup> In this regard, we seek comment regarding the concerns of U.S. private-sector licensees of HF facilities as well as relevant public sector entities.

80. Widespread access in most countries to consumer electronics and other forms of information technology (such as radios, televisions, personal computers, facsimile machines, video cassette recorders, and satellite television receive only (TVRO) earth stations) permits information both to enter and exit even relatively closed societies, in spite of government controls. Information entering a closed society has diverse potential effects. One of these is to support and maintain reform movements by reporting internal events.<sup>106</sup> Incoming information also can foil government attempts to isolate the resident population. As we have already noted, although the Chinese Government took steps to restrict the entry of foreign news sources into China, student protesters used facsimile machines to both send and receive information about their activities.<sup>107</sup> Incoming information can report on neighboring countries' events, thereby providing the local populace with both inspiration to take action and models to emulate for specific strategies and tactics. Western media in closed societies may give indirect instruction on how foreign democracies function by introducing the concepts of accountability, free speech, elections, and public debate.

81. The possession of mass media and telecommunications technologies at the consumer level also permits information to leave closed societies, which could help marshall world opinion against repression and in support of pro-democratic movements, while limiting the prevailing government's options against the demonstrators.<sup>108</sup> Finally, the proliferation of portable recording media such as camcorders and tape decks increases the probability that many newsworthy events will be recorded, by amateurs if by no one else. Ordinary people with such equipment, therefore, are capable of putting a nation in the international media spotlight almost instantaneously. Today, some TV networks actively solicit submissions from video enthusiasts,<sup>109</sup>

<sup>106</sup> We have already noted the Romanian experience in relying on foreign broadcasts for news of the revolution in their own country. See *supra* note 3.

<sup>107</sup> C. McAllister (ed.) *Piercing the Chinese Wall: All the News That's Fit to Fax* in *Business Week*, Dec. 4, 1989 at 114G.

<sup>108</sup> It is unclear how the Chinese Government would have handled the student protests in the absence of a global audience.

<sup>109</sup> R. Shaw, *Home Camcorders Bring Amateur Night to TV News*, *Electronic Media*, Sept. 18, 1989 at 26.

thereby thwarting attempts to stifle conventional news coverage.

82. NTIA requests comment on the relationship between the presence of such information technology and the spread and relative success of popular movements worldwide. When internal "free" systems of communications are established within a country, it may be more difficult for totalitarian, non-democratic regimes to survive, or to regain power. What consumer electronic products are most important in serving this function, and what are their limitations? To what extent does widespread access to some or all of these technologies lead to more open exchange of information and dialogue? Would increased access to these technologies abroad, in turn, increase demand for U.S. information?

#### D. Strategies to Foster Global Competitiveness

83. Maintaining and improving U.S. international competitiveness is primarily a task of private industry—driven by market forces. Nevertheless, government policies play an important role, in both positive and negative ways. Positive government actions can encourage productive investment, promote efficient operations of markets, and reduce foreign trade barriers, in areas critical to the enhancement of U.S. global competitiveness. On the other hand, a U.S. legal and regulatory environment that discourages investment and efficiency, and places burdens on domestic firms not shared by their foreign counterparts, can have a negative effect on global competitiveness of U.S. firms.

84. Despite the geographic diversity of global media firms, their participation in national or regional markets is governed by the applicable laws, regulations, and policies of each country in which they operate. In any given country, a media firm may face restrictions on its ownership of broadcast and transmission properties, program content regulations and import quotas, intellectual property protection that may be different from the rest of the world, varying degrees of antitrust regulation, and unique equipment and transmission standards requirements. The ability of some firms to operate globally may be limited by these measures, both by the substantive restrictions imposed in particular countries and by the sheer diversity of approaches across countries.

85. Accordingly, NTIA seeks information about the experiences of global media firms with regulations and other types of government-imposed barriers in the foreign countries they

seek to enter. What U.S. and foreign laws and regulations exist that affect media companies in their efforts to compete globally? How do such laws and regulations vary from country to country? In this regard, while commenters are welcome to raise whatever issues they consider relevant to these concerns, we also invite parties to address the specific areas discussed below. In addition, we seek comment on the role that foreign state media entities are playing in the formulation of laws and policies affecting global media firms. Are they responsible for maintaining barriers or erecting new barriers as tactics to protect their prominence? How should U.S. policy respond?

#### 1. National and International Standards

86. The media globalization trend may be fostered by improved international transmission and distribution systems for efficient information transfer.<sup>110</sup> As geographic media coverage grows, hardware interconnectivity and software compatibility become increasingly important. National and international standards can provide certainty in the marketplace and facilitate the global sharing of information. For example, in the motion picture industry, the *de facto* 35 mm film standard may have promoted the growth of global markets in film. However, such standards can also function as barriers to market entry. NTIA requests comment on the effect of national and international standards on international media firms and U.S. policy interests. We seek comment from media firms and other parties on the pending communications standards or standards proceedings that either promote or impede entry into national or international media markets. What is the role of national and international standards-setting processes on the media marketplace?

#### 2. Worldwide Intellectual Property Protection

87. In March 1989, the Motion Picture Export Association of America, Inc. (MPEAA) submitted a report to the United States Trade Representatives (USTR) on international trade restrictions faced by U.S. motion picture exporters. The MPEAA identified the lack of intellectual property protection as a key area of concern in 77% of the 61 countries and regions studied. In April, 1989, the International Intellectual Property Alliance (IIPA)<sup>111</sup> submitted a

report to USTR that identified trade losses due to, among other things, unauthorized duplication practices, or "piracy", in "12 problem countries."<sup>112</sup>

88. NTIA requests comment on the continuing need for intellectual property protection worldwide and its significance in the global growth of media firms. What effect does intellectual property protection, or the lack thereof, have on the global growth of media firms? How should U.S. communications and information policy respond to these problems?

89. The availability of international intellectual property protection for U.S. copyright holders has been affected by U.S. withdrawal from the United Nations Educational and Cultural Organization (UNESCO) which administers the Universal Copyright Convention.<sup>113</sup> Moreover, the United States was not a signatory nation of the Berne Convention, the only other major international copyright convention, until March 1989. In light of the need for worldwide copyright protections, to what extent does U.S. adherence to the Berne Convention provide the requisite protection needed to promote the continued global growth of U.S. media firms? If such adherence does not, alone, provide sufficient remedies for mass media piracy problems, what additional steps should the United States take to ensure adequate protection for the intellectual property rights of U.S. copyright holders?

90. Congress is currently considering legislation to amend the Copyright Act to recognize further "moral rights" in response to the creative community's concerns about "abuses" by media firms such as colorization of movies, and time compression and expansion techniques in the broadcasting and cable

Film Marketing Association, the Association of American Publishers, the Computer and Business Equipment Manufacturers Association, the Motion Picture Association of America (MPAA), the National Music Publishers' Association, and the Recording Industry Association of America.

<sup>110</sup> The report concluded in part that piracy losses to the U.S. economy in 1988 exceeded an estimated \$1.3 billion. These piracy losses are distributed roughly as follows: \$547 million to the book publishing industry; \$326 million to the motion picture industry; and \$272 million to the recording industry. Four years of intense bilateral negotiations between the U.S. and 10 countries identified in 1984 as leading in piracy losses, have resulted in a reduction in estimated losses by over 50% to \$645 million. Despite progress over the past five years, the report stated that some countries have not yet fully committed to solving the piracy problem, and that continued pressure from Congress and the Executive Branch is needed. *Id.* at i-ii.

<sup>111</sup> See U.S. Congress, Office of Technology Assessment, *Intellectual Property Rights in an Age of Electronics and Information*, CTA-CIT-302 (Washington, DC: USGPO, April, 1986), 213-253.

<sup>110</sup> See *supra* paras. 31-34.

<sup>111</sup> IIPA is comprised of the Computer Software and Services Industry Association, the American

industries.<sup>114</sup> How would these proposed amendments to the Copyright Act<sup>115</sup> affect the global growth of U.S. information and electronic media firms?

#### IV. Conclusion

91. NTIA requests that comments be filed in response to the questions set forth in this Notice on or before May 11, 1990. Reply comments should be filed on or before June 22, 1990.

Dated: February 13, 1990.

Janice Obuchowski,

*Assistant Secretary of Commerce for  
Communications and Information.*

[FR Doc. 90-3723 Filed 2-15-90; 8:45 am]

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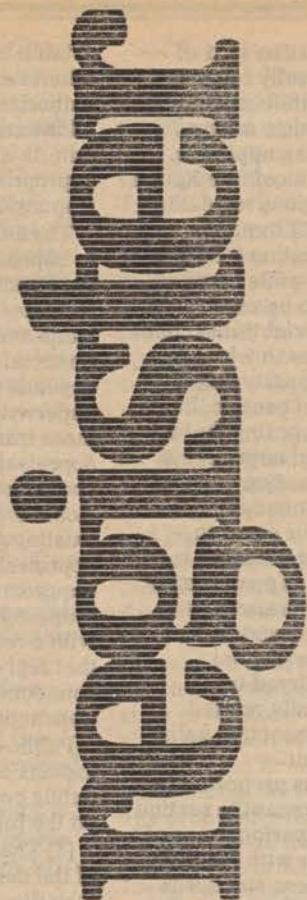
<sup>114</sup> See S. 1198, S. 1253, H.R. 2090, 101st Cong., 1st Sess. (1989).

<sup>115</sup> 17 U.S.C. 101 *et seq.*



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**Friday**  
**February 16, 1990**



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## **Part VII**

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# **Department of the Treasury**

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**Comptroller of the Currency**

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**12 CFR Part 34**  
**Real Estate Appraisals; Notice of  
Proposed Rulemaking**

**DEPARTMENT OF THE TREASURY****Office of the Comptroller of the Currency****12 CFR Part 34**

[Docket No. 90-4]

**Real Estate Appraisals****AGENCY:** Office of the Comptroller of the Currency, Treasury.**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Office of the Comptroller of the Currency ("OCC") is proposing to amend 12 CFR part 34 to include a new subpart C on standards for the performance of real estate appraisals. The proposed regulation implements title XI of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. 101-73, 103 Stat. 183, 511 (1989). It is intended to protect federal financial and public policy interests in real estate-related financial transactions requiring the services of an appraiser. Title XI of FIRREA and the proposed regulation provide the OCC with added assurance that real estate appraisals used in connection with federal responsibilities and requirements are performed in accordance with uniform standards by individuals whose competency has been demonstrated and whose professional conduct will be subject to effective supervision. Toward this end, the proposed regulation identifies which transactions require an appraiser, sets forth minimum standards for performing appraisals, and distinguishes those appraisals requiring the services of a state certified appraiser from those requiring a state licensed appraiser.

**DATES:** Comments must be received by April 17, 1990.

**ADDRESSES:** Comments should be directed to: Communications Division, 5th Floor, 490 L'Enfant Plaza East SW., Washington, DC 20219, Attention: Docket No. 90-4. Comments will be available for public inspection and photocopying at the same location.

**FOR FURTHER INFORMATION CONTACT:** Tommy R. Tucker, National Bank Examiner, Supervision Policy/Research Division, (202) 447-1164, or Horace G. Sneed, Attorney, Legal Advisory Services Division, (202) 447-1881, Office of the Comptroller of the Currency, Washington, DC 20219.

**SUPPLEMENTARY INFORMATION:****A. Background**

Title XI of FIRREA is designed to ensure that more reliable appraisals are rendered in connection with federally

related transactions. Section 1121 of FIRREA defines a "federally related transaction" as a real estate-related financial transaction which, *inter alia*, requires the services of an appraiser. Pursuant to the provisions of title XI, the federal financial institutions regulatory agencies (the "agencies")<sup>1</sup> and the Resolution Trust Corporation ("RTC") are proposing to require state certified or licensed appraisers to be used for all real estate-related financial transactions except those transactions in which a lien is placed on real property solely through an abundance of caution. In addition, the OCC is proposing that a state certified or licensed appraiser is not required if the transaction value of the real estate-related financial transaction is less than or equal to \$15,000. The OCC, acting pursuant to section 1112 of FIRREA, is proposing to require state certified appraisers to be used for all appraisals, except non-complex 1-to-4 family residential property appraisals rendered in connection with a federally related transaction having a transaction value below a specified amount.

In addition, the OCC is proposing to prescribe standards, pursuant to section 1110 of FIRREA, for the performance of appraisals in connection with federally related transactions. These standards would require that all such appraisals be written and that they conform to the Uniform Standards of Professional Appraisal Practice ("USPAP") promulgated by the Appraisal Foundation<sup>2</sup> and the additional standards set forth in the proposed regulation.

The proposed regulation is intended to supplement the appraisal guidelines currently in effect that have been issued by the OCC,<sup>3</sup> and regulations regarding appraisals for other real estate owned.<sup>4</sup> Those guidelines and regulations will remain in effect, subject to amendment.

FIRREA leaves with the states the responsibility to develop certification and licensing criteria for real estate appraisers. The Appraisal Subcommittee of the Federal Financial Institutions Examination Council ("FFIEC"), the agencies, and the RTC are charged with reviewing the qualification criteria

established by the states as these criteria are promulgated and, as authorized by title XI, may establish additional criteria and amend those criteria as may be necessary or appropriate to carry out their statutory responsibilities.

The OCC is proposing this regulation to improve the safety and soundness of the financial institutions that it regulates. The soundness of real estate loans and investments made by financial institutions covered by Title XI depends upon the adequacy of the underwriting or analysis used to support these transactions. A real estate appraisal is one of several essential components of the lending process. Accordingly, through the integration of existing guidance on real estate appraisals with the additional requirements imposed by Title XI, the proposed regulation provides the OCC with a reasonable degree of assurance that real estate appraisals used in connection with federally related transactions will be reliable.

Public comment is solicited on all aspects of the proposed rule. In addition, public comment is specifically requested on the following points.

(1) The OCC requests comment on all of the definitions used, particularly including "complex 1-to-4 family residential property appraisal" and "transaction value."

(2) The OCC requests comment on the amount and appropriateness of the *de minimis* level below which a state certified or licensed appraiser is not required.

(3) The OCC requests comment on the criteria which determine when a state certified appraiser is required.

(4) The OCC requests comment on the additional appraisal standards set forth in the proposed regulation.

**B. Section-by-Section Analysis****Section 34.41 Authority, Purpose, and Scope**

This section identifies Title XI of FIRREA as the authority under which this proposed regulation is promulgated. Further, the section provides that the proposed regulation would be applicable to all institutions regulated by the OCC and their direct and indirect subsidiaries (collectively referred to as "regulated institutions"), and to the OCC itself.

**Section 34.42 Definitions**

Except where noted below, the definitions set forth in Title XI apply to the terms used in this regulation.

— "Appraisal." This definition currently is used by nineteen federal

<sup>1</sup> The Board of Governors of the Federal Reserve System ("Board"), Federal Deposit Insurance Corporation ("FDIC"), National Credit Union Administration ("NCUA"), the OCC and the Office of Thrift Supervision ("OTS").

<sup>2</sup> The Appraisal Foundation was established on November 30, 1987, as a not-for-profit corporation under the laws of Illinois.

<sup>3</sup> See "Guidelines for Real Estate Appraisal Policies and Review Procedures," distributed by the divisions of bank supervision at the Board, FDIC and OCC.

<sup>4</sup> 12 CFR 7.3025.

agencies.<sup>5</sup> The OCC believes that this widespread use and acceptance will produce consistent appraisals.

—"Complex 1-to-4 family residential property appraisal." Section 1113 of FIRREA allows the use of a state licensed appraiser for, among other federally related transactions, 1-to-4 family residential property appraisals, "unless the size and complexity requires a State certified appraiser." The definition of "complex 1-to-4 family residential property appraisal" provides guidance on factors that will determine if the services of a state certified appraiser are required. This list is illustrative only.

—"Market value." This definition is commonly used in connection with mortgage lending by a number of governmental agencies and others. This definition contemplates the consummation of a sale as of a specified date and the passing of title from seller to buyer under open and competitive market conditions requisite to a fair sale. It is designed to provide an accurate and reliable measure of the economic potential of property involved in federally related transactions. Moreover, the OCC believes that the widespread acceptance and use of this definition will provide consistency to appraisals.

In applying this definition of market value, adjustments to the comparables must be made for special or creative financing or sales concessions. No adjustments are necessary for those costs that are normally paid by sellers as a result of tradition or law in a market area; these costs are readily identifiable since the seller pays these costs in virtually all sales transactions. Special or creative financing adjustments can be made to the comparable property by comparisons to financing terms offered by a third party financial institution that is not already involved in the property or transaction. Any adjustment should not be calculated on a mechanical dollar-for-dollar cost of the financing or concession, but the dollar amount of any adjustment should approximate the market's reaction to the financing or concessions based on the appraiser's judgment.<sup>6</sup>

<sup>5</sup> See 49 CFR part 24, "Uniform Relocation Assistance and Real Property Acquisition Regulations for Federal and Federally Assisted Programs," 54 FR 8913 (March 2, 1989).

<sup>6</sup> This paragraph regarding comparables is taken from the standard definition of "market value" used by the Federal Home Loan Mortgage Corporation ("Freddie Mac"), the Federal National Mortgage Association ("Fannie Mae"), the OTS and others. By including this paragraph in the preamble rather than the regulation, the OCC does not intend to suggest

—"Real estate-related financial transaction." This definition is taken from section 1121(5) of FIRREA, except that "and" is replaced with "or" throughout so as to clarify the intent of Congress to apply the safeguards of Title XI as broadly as possible.<sup>7</sup>

—"State certified appraiser." This classification applies to appraisers who are recognized by the states as being more knowledgeable of and experienced in appraisals than are licensed appraisers. Section 1116 of FIRREA contemplates that each state or territory will adopt standards and procedures, consistent with the purposes of Title XI, for obtaining the designation of "State certified appraiser." To comply with the intent of Title XI, each state's standards and procedures must require its certified appraisers to meet, at a minimum, the criteria for certification issued by the Appraisal Foundation. Moreover, no state or territory may certify an appraiser unless that individual passes an examination, administered by the state or territory, that is consistent with and equivalent to the Uniform State Certification Examination issued or endorsed by the Appraisal Foundation. The proposed rule does not prevent a state from establishing additional certification criteria.

The OCC may, in the future, establish criteria for certified appraisers in addition to those adopted by a given state. Additionally, the Appraisal Subcommittee of the FFIEC may issue a written finding that the certification criteria of a state or territory are inadequate for one of several specified reasons. Thus, an individual may be a "State certified appraiser" only if (a) the individual complies with all state-imposed criteria and additional criteria, if any, imposed by the OCC, and (b) the appraiser certifications of a state have not been rejected by the Appraisal Subcommittee. As of July 1, 1991, appraisals for federally related transactions must be performed by state certified or licensed appraisers, unless this deadline is extended for a given state by the Appraisal Subcommittee. No extensions are permitted beyond December 31, 1991.

—"State licensed appraiser." Each state may elect to adopt licensing criteria that are less rigorous than certification criteria. However, licensing criteria must be adequate to protect

any change in the interpretation or application of the definition of "market value" as this term is currently used.

<sup>7</sup> See, e.g., Report of the House Banking, Finance and Urban Affairs Committee, H.R. Rep. No. 54, 101st Cong., 1st Sess., pt. 1, (the "House Banking Committee Report") 480, 481 (1989).

federal financial and public policy interests. For example, simply "grandfathering" all existing appraisers may not be acceptable. Rather, the states and territories are expected to design criteria that will ensure that licensed appraisers will have the experience and training sufficient to perform 1-to-4 family residential property appraisals that are below the dollar thresholds set forth in the proposed regulation and that are not "complex 1-to-4 family residential property appraisals" as this term is defined.

As with state certified appraiser criteria, the OCC may impose additional criteria for licensed appraisers. Moreover, the Appraisal Subcommittee is charged with monitoring state appraiser certifying and licensing agencies, and may reject state licenses if a state's appraisal policies, practices or procedures are found to be inconsistent with Title XI.

—"Tier 1 capital." This term is applied in determining circumstances which require the use of a state certified appraiser. For institutions regulated by the OCC, the components of Tier 1 capital may be determined by reference to 12 CFR part 3, Appendix A.

—"Tract development." A tract development may be units in a subdivision, condominium project, timeshare project, or any similar project meant to be sold as individual units over a period of time.

—"Transaction value." This definition is intended to clarify certain circumstances under which appraisals must be performed by a state certified appraiser. For example, a state certified appraiser is required when, among other instances, a 1-to-4 family residential property appraisal is performed in connection with a federally related transaction having a transaction value greater than \$1,000,000 or 10 percent of the regulated institution's Tier 1 capital, whichever is less.

#### Section 34.43 Transactions Requiring State Certified or Licensed Appraisers

(a) *Appraisals not required; procurement of appraisals.* Section 1121(4) of FIRREA defines a federally related transaction as a real estate-related financial transaction that, among other things, requires the services of an appraiser. The OCC recognizes that not all real estate-related financial transactions will require an appraisal. For instance, an appraisal would not be needed where a lien on real property has been taken as collateral solely through an abundance of caution and where the terms as a consequence have

not been made more favorable than they would have been in the absence of the lien.

The OCC also proposes not to require a state certified or licensed appraiser for real estate-related financial transactions having a transaction value less than or equal to \$15,000. This *de minimis* exception is intended to recognize that the benefits accruing to financial institutions from obtaining appraisals that conform to the requirements of the proposed regulation for transactions with a value below a *de minimis* amount may not offset the costs associated with compliance. Consequently, the OCC (along with the Board, FDIC, NCUA and RTC) has proposed that transactions with a value below the *de minimis* amount are not subject to this rule. The OCC, however, does not intend for the *de minimis* exception to prevent or discourage any regulated institution from obtaining an appraisal or other evaluation of property even though not otherwise required by law to do so.

(b) *Transactions requiring state certified appraisers.* The legislative history to Title XI evidences a clear intent that state certified appraisers be used for most appraisals performed in connection with federally related transactions.<sup>8</sup> The proposed regulation accomplishes this goal by requiring state certified appraisers for all federally related transactions that do not involve 1-to-4 family residential property. Moreover, a state certified appraiser is to be used even for appraisals of 1-to-4 family residential properties in three circumstances: first, for federally related transactions entered into by the OCC, if the transaction value exceeds \$1,000,000; second, for federally related transactions entered into by regulated institutions, if the transaction value exceeds \$1,000,000 or 10 percent of the institution's Tier 1 capital, whichever is less; and third, for federally related transactions that involve a "complex 1-to-4 family residential property appraisal" as this term is defined. For federally related transactions entered into by bridge banks, operating pursuant to 12 U.S.C. 1821(n), and national banks operated by the FDIC as conservator, the threshold for requiring state certified appraisers for 1-to-4 family residential properties will be \$1,000,000.

(c) *Transactions requiring either a state certified or licensed appraiser.* Any federally related transaction that does not require the services of a state certified appraiser must be performed by at least a state licensed appraiser.

<sup>8</sup> See, e.g., House Banking Committee Report at 481.

State licensed appraisers may perform appraisals rendered in connection with federally related transactions involving only 1-to-4 family residential properties, and only if the transaction value is below the threshold set forth above and the transaction does not involve a "complex 1-to-4 family residential property appraisal."

#### Section 34.44 Appraisal Standards

(a) *Minimum standards.* Section 1110 of FIRREA directs the OCC to prescribe appropriate standards for the performance of appraisals made in connection with federally related transactions within its jurisdiction. Further, section 1110 mandates that the standards require, at a minimum, that appraisals be written and that they conform to the generally accepted appraisal standards promulgated by the Appraisal Foundation. The OCC is empowered to require compliance with additional appraisal standards if it makes a written determination that such additional standards are required in order to properly carry out its statutory responsibilities. Section 34.44 of the proposed regulation incorporates the minimum standards set forth in the statute and lists additional criteria that apply to all appraisals performed in connection with federally related transactions within the OCC's jurisdiction.

In enacting Title XI of FIRREA, Congress was responding to perceived problems in the appraisal industry. These problems were identified by the House Committee on Government Operations,<sup>9</sup> and have been cited repeatedly in the legislative history of Title XI.<sup>10</sup> The OCC is proposing to adopt the following standards to further the legislative intent in addressing these problems. The standards are designed to contribute to safe and sound banking practices by requiring reliable appraisal reports.

—(1) *Compliance with the USPAP; departure provision.* This standard incorporates the current standards in the USPAP, and clarifies that the Departure Provision in the USPAP is not applicable to appraisals conducted in connection with federally related transactions. The OCC believes that the

Departure Provision allows appraisal services to be performed which produce something different from the "appraisal" contemplated by Title XI of FIRREA. For instance, a letter opinion might be produced, consistent with current USPAP requirements, that could be silent about trends of rents, vacancies, or overbuilding. The Comment on the Departure Provision in the USPAP lists examples of when the departure provision might apply;<sup>11</sup> however, for purposes of the proposed regulation, such services are not appraisals as this term is used in Title XI. The OCC believes that the Departure Provision in the USPAP allows for the omission of data that should be included in all appraisals rendered in connection with federally related transactions and, therefore, has proposed that the Departure Provision shall not apply to such appraisals.

Changes in the USPAP will apply to federally related transactions unless the OCC has stated in writing that the change shall not apply to federally related transactions within its primary jurisdiction.

—(2) *Disclosure of compliance with the USPAP Competency Provision.* The Competency Provision of the USPAP requires an appraiser to have the knowledge and experience necessary to complete an assignment or disclose the lack of knowledge and experience and take steps to complete the appraisal assignment competently. This standard requires an appraisal to document any steps taken to comply with the Competency Provision of the USPAP.

—(3) *Market value.* This standard requires an appraisal to document an appraiser's opinion of a property's "market value" as this term is defined. The definition of "market value" was developed by Fannie Mae and Freddie Mac with the input of professional appraisal organizations. Without such a standard, a lender might select a definition of value that allows the value of real property to be increased by favorable financing, going concern value, or special value to a specific user. This standard proposes to provide interested parties the information necessary to determine the market value of a property.

—(4) *Written appraisals; forms.* This standard sets forth the legislative mandate that all appraisals be written. Moreover, it requires an appraisal to be

<sup>9</sup> House Comm. on Government Operations, "Impact of Appraisal Problems on Real Estate Lending, Mortgage Insurance, and Investment in the Secondary Market," H.R. Rept. No. 891, 99th Cong., 2d Sess. (1986).

<sup>10</sup> See, e.g., 135 Cong. Rec. S4004 (daily ed. April 17, 1989) (statement of Sen. Dodd); H.R. Rept. No. 1001, 100th Cong. 2d Sess., pt. 1, at 19, 21-28; 133 Cong. Rec. H10708 (daily ed. Nov. 20, 1987) (statement of Rep. Barnard); 132 Cong. Rec. H3452 (daily ed. June 6, 1986) (statement of Rep. Barnard).

<sup>11</sup> These examples include introducing into evidence during a judicial proceeding a one page summary that incorporates by reference an appraiser's file or preparing a brief update of a previously prepared appraisal.

sufficiently descriptive to enable a reviewer to readily ascertain the estimated value reported and the rationale for that estimate. The appraisal may be in a narrative format or on a form chosen by an appraiser, but the appraisal must comply with all provisions of the regulation. A form not initially designed for use in connection with federally related transactions may be used provided that it is modified as necessary to comply with the requirements of Title XI and the proposed regulation. Regardless of the format selected, the appraisal must be readily understood by a third party and must reflect the complexity of the property that is appraised. This will enable the reader of the appraisal to independently determine its adequacy based upon a written description of the characteristics of the collateral appraised.

—(5) *Sales history.* This standard is designed to enable a reviewer to compare an appraiser's opinion of a property's market value with recent sales prices. In addition to giving the reviewer a basis on which to evaluate the accuracy of the subject property appraisal, it also will assist the reviewer in identifying recent trends in market prices. A sales history may identify a single sale or a series of sales at artificially inflated prices.

Sales histories are required for one year for 1-to-4 family residential property and for three years for all other types of property. The more demanding reporting standard for nonresidential property is imposed because larger loan amounts are generally granted when the loan security is not a 1-to-4 family dwelling.

—(6) *Rents and vacancies.* An appraisal should disclose current income produced by a property if the property will continue to be used to generate income after a transaction is consummated. This information is essential for an accurate picture of the market value of a property. Appraisal values should be predicated upon current rents and current vacancies for the subject property if the property is income-producing. That is, appraisals should be based upon income that can realistically be earned under current market and economic conditions (in light of rents being earned on comparable properties), rather than upon estimated or projected income that cannot be supported by current market conditions. If an appraiser reports a high current vacancy, this condition may require a lender to impose special conditions on the loan.

—(7) *Market period.* This standard requires an appraiser to employ a

marketing period that is reasonable in light of a given property's characteristics and market conditions, and to disclose the assumptions used. An appraiser's opinion of market value will depend in part on the appraiser's estimate of how long a given piece of property will remain for sale. For instance, an appraisal using a long marketing period is likely to produce a higher market value than an appraisal using a shorter marketing period. This information will better enable the reader of the appraisal to assess its accuracy.

—(8) *Trend analysis.* An appraisal should inform the reader of any market trends, regardless of whether the trend reflects rising or declining values. Such trends might include, for example, increasing vacancy rates, greater use of rent concessions, or declining sales prices. Identification of negative trends is particularly important so that a regulated institution may avoid extending credit on the basis of insufficient collateral. Market trends may be indicated in market activity on the subject of property, such as a listing, options, or sales agreements; accordingly, such activity should be disclosed.

—(9) *Deductions and discounts.* This standard is designed to avoid having appraisals prepared using unrealistic assumptions. For federally related transactions, the subject property must always be valued in its "as is" condition as of the date of valuation. Further, appropriate deductions or discounts are to be made from an estimated retail or stabilized value to arrive at the market value as of the date of valuation identified in the appraisal. Unsold units or unleased space pose a significant risk to an owner, buyer, or lender. For this reason, the impact of such risks must be reflected in the market value estimate.

—(10) *Prohibited influences.* All appraisals are to be performed without pressure from someone who desires a specific value. Accordingly, every appraisal rendered in connection with a federally related transaction shall include a statement to the effect that employment of the appraiser was not conditioned upon the appraisal producing a specific value or a value within a given range. Similarly, future employment prospects should not be dependent upon an appraisal producing a specified value. Employment and compensation should not be based on whether a loan application is approved, as this, too, would exert pressure on an appraiser to render whatever appraisal is necessary for the loan to be approved.

—(11) *Self-contained appraisals.* This standard requires an appraisal to contain full information necessary to

enable a reader of the appraisal to understand the appraiser's opinion. The appraisal should not incorporate by reference a document that is not readily available to the reader. Studies prepared by a third party should be verified to the extent his or her assumptions or conclusions are used. Moreover, the appraiser's acceptance or rejection of a third party study and its impact on value should be fully explained. The appraisal itself should enable the reader to understand the conclusion without having to refer to numerous other documents. Moreover, the conclusion must be reasonable in light of the information set forth in the appraisal. These requirements will force an appraiser to obtain adequate data before issuing an opinion of market value.

—(12) *Legal description.* A legal description of the property is to be included in an appraisal so as to avoid confusion that may arise from less precise identification. This requirement enables a reader to compare the legal description in the appraisal to the legal description in the loan documents. The legal description is to be provided in addition to, and not in lieu of, the description required in the USPAP.

—(13) *Personal property, fixtures, and intangible items.* An appraisal is to include a separate assessment of personal property, fixtures, or intangible items that are attached to or located on real property if the personal property, fixture or intangible item affects the market value of the real property. Furniture and fixtures should have separate valuations because their economic life is shorter than real property improvements and may require special lending or investment considerations. If the personal property, fixture, or intangible items is not a part of the transaction, then this fact should be stated and the impact on market value should be disclosed. Favorable loan financing or any business interest or other intangible items should be valued separately within the appraisal. These requirements will help provide a reader with a more complete understanding of the market value of the real property as it will be at the time the parties enter into the transaction.

—(14) *Use of recognized appraisal approaches.* At the request of clients, some appraisers have not prepared cost estimates of value, or estimates of value based on the capitalization of income, or value estimates based on direct sales comparisons. This standard requires an appraiser to employ each of these recognized approaches to market value and explain how each approach is used.

However, if one or more approaches is not used, an appraiser is to explain the reason for eliminating any approach. This requirement is intended to produce appraisals made only after all approaches to market value have been considered and reconciled, thereby improving the accuracy of the appraisal. Disclosure of the fact that an approach was not used will assist the reader in evaluating the adequacy of the appraisal.

(b) *Unavailability of information.* The OCC realizes that some information required by the USPAP or this proposed regulation to be in an appraisal may be unavailable. For example, historic rents will not exist for a building under construction at the time of appraisal. However, a reader of an appraisal should be made aware of any material information that is unavailable and why the information could not be obtained, so as to assist the reader in reviewing the appraisal.

(c) *Additional standards.* The standards required by this proposed regulation are the minimum standards to be met by every appraisal made in connection with a federally related transaction. However, regulated institutions may employ additional standards if circumstances so warrant.

#### *Section 34.45 Appraiser Independence*

An appraiser's goal should be to produce an objective opinion about the market value of a property. This objectivity may be compromised if the appraiser is involved in the transaction, such as deciding whether to extend credit. An opinion about the merits of the transaction potentially will affect the results of the appraisal. Similarly, a direct or indirect interest in the property appraised may undermine the accuracy of the appraisal. An appraiser would have a direct interest, for example, by owning all or part of the property being appraised. An appraiser would have an indirect interest, for example, if he or she owns property adjacent to the parcel being appraised. This indirect interest would extend to any property whose value is likely to be affected by an appraisal, if the appraisal is the proximate cause for the effect. Moreover, a nonpecuniary interest, such as a desire to help an associate obtain a loan, may undermine the accuracy of an appraisal.

To further the goal of appraiser independence, the OCC proposes to require that fee appraisers (that is, appraisers not permanently employed by a given regulated institution) be hired by a regulated institution or its agent rather than the borrower. In order to avoid potential conflicts of interest, staff

appraisers (that is, appraisers permanently employed by a given regulated institution) should not be supervised, controlled, or influenced by loan underwriters, loan officers, or collection officers.

The OCC recognizes that in certain cases it may be necessary for loan officers and directors to perform appraisals. Such cases would depend on a regulated institution's particular circumstances. An example would be a small rural institution where the only qualified individual to perform appraisals is a loan officer, and separating this person from the loan and collection departments is impossible. In such situations, the OCC recommends that this individual perform appraisal work on loans in which he or she is not otherwise involved. In cases where loan officers or directors perform appraisals, regulated institutions are expected to ensure that the appraisers are qualified<sup>12</sup> and that appraisal reports are adequate. Directors and officers should abstain from any vote or approval involving assets on which they performed an appraisal. In all, sufficient safeguards should be in place to permit appraisers to exercise independent judgment, thereby ensuring the validity of the appraisal process.

#### *Section 34.46 Professional Association Membership: Competency*

(a) *Membership in appraisal organizations.* The legislative history evidences an intent to prohibit discrimination against appraisers solely by virtue of membership or lack of membership in a particular appraisal organization.<sup>13</sup> Accordingly, the proposed regulation prohibits any entity covered by Title XI from basing decisions regarding the employment of appraisers solely on membership in an appraisal organization. An institution should review the qualifications of appraisers rather than the qualifications of appraisal organizations to ensure that a qualified individual is being employed. Membership in an organization may be considered; however, it may not be the sole determining factor in accepting or rejecting an appraiser.

(b) *Competency.* Not all appraisers are competent to perform every type of appraisal that will be needed in connection with federally related transactions. For instance, an appraiser who is experienced in appraising

shopping centers may not be competent to appraise a golf course. A financial institution should look beyond an individual's title to determine if he or she has the experience and training needed to perform the appraisal. This provision is not intended to prohibit in every circumstance an individual from appraising a type of property with which he or she is not familiar. However, in such instances, an appraiser may perform the appraisal only in accordance with the Competency Provision in the USPAP. In addition, an individual who is not a state certified or licensed appraiser may assist in the preparation of an appraisal if he or she is directly supervised by a certified or licensed appraiser, as appropriate, and the appraisal is approved and signed by a certified or licensed appraiser.

#### *Section 34.47 Enforcement*

Section 1120 of FIRREA vests the OCC with the authority to bring an action for civil money penalties against a regulated institution within the agency's primary jurisdiction. The proposed regulation makes clear that the additional remedies available to the OCC under section 8 of the Federal Deposit Insurance Act also apply. These can include civil money penalties, cease and desist orders, and orders of removal and prohibitions against institutions and institution-affiliated parties. "Institution-affiliated parties" specifically includes, but is not limited to, appraisers.<sup>14</sup>

#### *Regulatory Flexibility Act*

Pursuant to section 605(b) of the Regulatory Flexibility Act, the Comptroller of the Currency certifies that these changes, if adopted, are not expected to have a significant economic impact on a substantial number of small entities.

The OCC anticipates that these changes may increase, to some degree, certain costs for borrowers and national banks of all sizes. However, these increased costs should be more than offset by savings realized by decreased losses. The cost increase may stem from at least two aspects of the rule. First, since national banks are required to use certified or licensed appraisers, the cost of an appraisal may rise somewhat. Some borrowers may resist the increased appraisal cost and decide not to take out a loan secured by real estate. Some banks may elect to absorb all or a portion of any increased appraisal cost, thereby reducing loan profits. Second, in this proposal, OCC has expanded its existing appraisal guidelines to include

<sup>12</sup> It should be noted that directors and officers who perform appraisals in connection with federally related transactions must be licensed or certified, as appropriate.

<sup>13</sup> See, e.g., House Banking Committee Report at 484; see also H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess., at 457 (1989).

<sup>14</sup> See FIRREA, sections 204(f)(6) and 901(b)(1).

specifically some additional items. Those items could add to appraisal costs.

The OCC expects these changes to decrease overall costs to national banks of all sizes. National banks will have better information about the value of the real estate involved in federally related transactions and can ensure that each loan is collateralized adequately. Therefore, the cost to a bank of default should be reduced.

The OCC believes that these changes will benefit banks of all sizes. Any interested person is invited to comment regarding this certification.

#### Executive Order 12291

The OCC has determined that this proposal does not constitute a "major rule" within the meaning of Executive Order 12291 and Treasury Department Guidelines. Accordingly, a Regulatory Impact Analysis is not required on the grounds that this proposed regulation, exclusive of those effects attributable to requirements imposed by Title XI of FIRREA, (1) would not have an annual effect on the economy of \$100 million or more, (2) would not result in a major increase in the cost of bank operations or governmental supervision, and (3) would not have a significant adverse effect on competition (foreign and domestic), employment, investment, productivity or innovation, within the meaning of the executive order.

The OCC anticipates that these changes may increase, to some degree, certain costs for borrowers and national banks. However, increased costs should be more than offset by savings realized by decreased losses. The cost increase may stem from at least two aspects of the rule. First, since national banks are required to use certified or licensed appraisers, the cost to a borrower of an appraisal may rise somewhat. Some borrowers may resist the increased appraisal cost and decide not to take out a loan secured by real estate. Some banks may underwrite all or a portion of the appraisal cost, thereby reducing loan profits. Second, in this proposal, OCC has expanded its existing appraisal guidelines to specifically include some additional items in appraisal reports. Those items could add to appraisal costs.

The OCC expects these changes to decrease overall costs to national banks. National banks will have better information about the value of real estate in federally related transactions and can ensure that each loan is collateralized adequately. Therefore, the cost to a bank of default should be reduced.

The appraisal industry (through the USPAP), the OCC, and the other federal financial institutions regulatory agencies, have required many of the proposed appraisal procedures and requirements for many years. For the most part, this proposal only codifies practices which, for prudent bankers, are usual and customary.

The OCC believes that these changes will benefit national banks, reduce costs of loans overall by reducing the losses associated with defaults, and protect the banks' federal deposit insurance fund and the taxpayer. Any interested person is invited to comment regarding this certification.

#### Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3504(h)). Comments on the collection of information contained in this notice of proposed rulemaking should be sent to the Comptroller of the Currency, Legislative and Regulatory Analysis Division, 5th Floor, 490 L'Enfant Plaza East, SW., Washington, DC 20219, with a copy to the Office of Management and Budget, Paperwork Reduction Project, Washington, DC 20503.

The collection of information in this proposed regulation is in 12 CFR 34.44. This information is needed to protect federal financial and public policy interests in real estate-related transactions requiring the services of an appraiser. Each national bank will use the information in connection with determining whether and upon what terms to enter into a federally related transaction, such as making a loan on commercial real estate or purchasing property for its operations. In addition, the OCC will use this information in its examination of national banks to ensure that extensions of credit collateralized by real estate and permissible investments in real estate are undertaken by national banks in accordance with safe and sound banking principles. The use of this information by banks and the OCC will help ensure that national banks are not exposed to risk of loss from inadequate appraisals. The likely recordkeepers are for-profit institutions.

This proposal, if adopted as a final rule will increase total recordkeeping burden by an estimated 287,500 hours. The average burden will be approximately 15 minutes per federally related transaction. Depending on the type of property appraised, the actual

burden per transaction is estimated to range from approximately two hours for a large, complex, commercial real estate loan to approximately five minutes or less for a small loan secured by a single family residence. Large banks, by their nature, will make more large commercial loans.

OCC: 4200 recordkeepers × 68 hours  
= 287,500 total burden hours.

#### List of Subjects in 12 CFR Part 34

National banks, Real estate lending, Adjustable-rate mortgages, Appraisals, Reporting and recordkeeping requirements.

#### Authority and Issuance

For the reasons set forth in the preamble, part 34 of Chapter I of Title 12 of the Code of Federal Regulations is proposed to be amended as set forth below:

#### PART 34—REAL ESTATE LENDING AND APPRAISALS

1. The authority citation for part 34 is revised to read as follows:

**Authority:** 12 U.S.C. 1 *et seq.*; 12 U.S.C. 93a; 12 U.S.C. 371; 12 U.S.C. 1701j-3; Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 103 Stat. 511.

2. A new subpart C is added to read as follows:

#### Subpart C—Appraisals

- 34.41 Authority, purpose, and scope.
- 34.42 Definitions.
- 34.43 Transactions requiring a state certified or licensed appraiser.
- 34.44 Appraisal standards.
- 34.45 Appraiser independence.
- 34.46 Professional association membership; competency.
- 34.47 Enforcement.

#### Subpart C Appraisals

##### § 34.41 Authority, purpose, and scope.

(a) **Authority.** This subpart is issued by the Office of the Comptroller of the Currency (the "OCC") under Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") [Pub. L. No. 101-73, 103 Stat. 183 (1989)].

(b) **Purpose and Scope.** (1) Title XI provides protection for federal financial and public policy interests in real estate-related transactions by requiring real estate appraisals used in connection with federally related transactions to be performed by writing, in accordance with uniform standards, by appraisers whose competency has been demonstrated and whose professional conduct will be subject to effective supervision. This regulation implements the requirements of Title XI, and applies

to all federally related transactions entered into by institutions regulated by the OCC ("regulated institutions") and to federally related transactions entered into by the OCC.

(2) This regulation:

- (i) Identifies which real estate-related financial transactions require the services of an appraiser;
- (ii) Prescribes which categories of federally related transactions shall be appraised by a state certified appraiser and which by a state licensed appraiser; and
- (iii) Prescribes minimum standards for the performance of real estate appraisals in connection with federally related transactions under the jurisdiction of the OCC.

**§ 34.42 Definitions.**

- (a) *Appraisal* means a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion as to the market value of an adequately described property as of a specific date(s), supported by the presentation and analysis of relevant market information.
- (b) *Appraisal Foundation* means the Appraisal Foundation established on November 30, 1987, as a not-for-profit corporation under the laws of Illinois.
- (c) *Appraisal Subcommittee* means the Appraisal Subcommittee of the Federal Financial Institutions Examination Counsel.
- (d) *Complex 1-to-4 family residential property appraisal* means an appraisal in which the property to be appraised is atypical for the marketplace. For example, atypical factors may include:

- (1) Architectural style;
- (2) Age of improvements;
- (3) Size of improvements;
- (4) Size of lot;
- (5) Neighborhood land use;
- (6) Potential environmental hazard liability;
- (7) Leasehold interests;
- (8) Limited readily available comparable sales data; or
- (9) Other unusual factors.

- (e) *Federally related transaction* means any real estate-related financial transaction that:

- (1) The OCC or any regulated institution engages in, or contracts for, and

- (2) Requires the services of an appraiser.

- (f) *Market value* means the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller, each acting prudently, and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this

definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:

- (1) Buyer and seller are typically motivated;
- (2) Both parties are well informed or well advised, and both acting in what they consider their own best interest;
- (3) A reasonable time is allowed for exposure in the open market;
- (4) Payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto; and
- (5) The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

(g) *Real estate-related financial transaction* means any transaction involving:

- (1) The sale, lease, purchase, investment or exchange of real property, including interests in property, or the financing thereof; or
- (2) The refinancing of real property or interests in real property; or
- (3) The use of real property or interests in property as security for a loan or investment, including mortgage-backed securities.

(h) *State certified appraiser* means any individual who has satisfied the requirements for state certification in a state or territory whose criteria for certification as a real estate appraiser currently meets the minimum criteria for certification issued by the Appraiser Qualification Board of the Appraisal Foundation. No person shall be a state certified real estate appraiser unless such individual has achieved a passing grade upon a suitable examination administered by a state or territory that is consistent with and equivalent to the Uniform State Certification Examination issued or endorsed by the Appraiser Qualification Board of the Appraisal Foundation. In addition, the Appraisal Subcommittee must not have issued a finding that the state's policies, practices, or procedures are inconsistent with title XI of FIRREA. The OCC may, from time to time, impose additional qualification criteria for certified appraisers performing appraisals in connection with federally related transactions within its jurisdiction.

(i) *State licensed appraiser* means any individual who has satisfied the requirements for state licensing in a state or territory where the licensing procedures comply with title XI of FIRREA and where the Appraisal Subcommittee has not issued a finding that the state's appraisal policies, practices, or procedures are inconsistent with title XI. The OCC may, from time to

time, impose additional qualification criteria for licensed appraisers performing appraisals in connection with federally related transactions within its jurisdiction.

(j) *Tier 1 capital* means such capital for year end 1992 as defined in Appendix A to part 3 of this chapter (See 54 FR 4177 (January 27, 1989)), calculated as of the date of the last Consolidated Report of Condition and Income.

(k) *Tract development* means a project of five units or more that is constructed as a single development.

(l) *Transaction value* means:

- (1) For loans or other extensions of credit, the amount of the loan or extension of credit; and

- (2) For sales, leases, purchases, and investments in or exchanges of real property, the market value of the real property involved.

**§ 34.43 Transactions requiring a state certified or licensed appraiser.**

(a) *Appraisals not required.* An appraisal performed by a state certified or licensed appraiser is not required for:

- (1) Any real estate-related financial transaction in which the transaction value is \$15,000 or less; or

(2) Any real estate-related financial transaction in which a lien on real property has been taken as collateral solely through an abundance of caution, and where the terms of the transaction as a consequence have not been made more favorable than they would have been in the absence of a lien.

(b) *Transactions requiring a state certified appraiser.* (1) All federally related transactions, other than those involving appraisals of 1-to-4 family residential properties, shall require an appraisal performed by a state certified appraiser.

(2) All appraisals of 1-to-4 family residential properties made in connection with federally related transactions shall require a state certified appraiser if:

- (i) For federally related transactions entered into by the OCC, the transaction value is greater than \$1,000,000; or

- (ii) For federally related transactions entered into by regulated institutions,<sup>1</sup>

<sup>1</sup> For purposes of § 34.43(b)(2)(ii) only, bridge banks operating under 12 U.S.C. 1821(n) and national banks operated by the FDIC as conservator are not considered regulated institutions and shall require a certified appraiser if the transaction value exceeds \$1,000,000.

the transaction value exceeds 10% of the regulated institution's Tier 1 capital or \$1,000,000, whichever is less.

(3) All complex 1-to-4 family residential property appraisals rendered in connection with federally related transactions shall require a state certified appraiser. The regulated institution shall determine whether the property is atypical in light of the factors listed in § 34.42(d), and shall make available, if requested by the OCC, appropriate evidence to support the determination.

(c) *Transactions requiring either state certified or licensed appraisers.* All appraisers for federally related transactions not requiring the services of a state certified appraiser shall be performed by either a state certified appraiser or a state licensed appraiser.

#### § 34.44 Appraisal standards.

(a) *Minimum standards.* For federally related transactions, all appraisals as defined in § 34.42(a) shall, at a minimum:

(1) Conform to the current Uniform Standards of Professional Appraisal Practice ("USPAP") as adopted by the Appraisal Foundation, unless disapproved by the OCC. For federally related transactions, the Departure Provision of the USPAP does not apply;

(2) If appropriate, disclose any steps taken to comply with the Competency Provision of the USPAP;

(3) Be based upon the definition of market value as set forth in § 34.42(f);

(4) (i) Be written and presented in a narrative format or on forms that satisfy all the requirements of this section;

(ii) Be sufficiently descriptive to enable the reader to ascertain the estimated market value and the rationale for the estimate; and

(iii) Provide detail and depth of analysis that reflect the complexity of the real estate appraised;

(5) Analyze and report in reasonable detail any prior sales of the property being appraised that occurred within the following time periods:

(i) For 1-to-4 family residential property, one year preceding the date when the appraisal was prepared; or

(ii) For all other property, three years preceding the date when the appraisal was prepared;

(6) Analyze and report data on current rents and current vacancies if the subject property is and will continue to be income-producing;

(7) Analyze and report a reasonable marketing period for the subject property;

(8) Analyze and report on current market conditions and trends that will affect projected income or the absorption period, to the extent they affect the value of the subject property;

(9) Analyze and report appropriate deductions and discounts for any proposed construction, or any completed properties that are partially leased or leased at other than market rents as of the date of the appraisal, or any tract developments with unsold units;

(10) Include in the certification required by the USPAP, an additional statement that the appraisal assignment was not based on a requested minimum valuation or specific valuation or approval of a loan;

(11) Contain sufficient supporting documentation with all pertinent information reported so that the appraiser's logic, reasoning, judgment, and analysis in arriving at a conclusion indicate to the reader the reasonableness of the market value reported;

(12) Include a legal description of the real estate being appraised in addition to the description required by the USPAP;

(13) Identify and separately value any personal property, fixtures, or intangible items that are not real property but are included in the appraisal, and discuss the impact of their inclusion, or exclusion, on the estimate of market value; and

(14) Follow a reasonable valuation method that addresses the direct sales comparison, income, and cost approaches to market value, reconciles those approaches, and explains the elimination of each approach not used.

(b) *Unavailability of information.* If information required or deemed pertinent to the completion of an appraisal is unavailable, that fact shall be disclosed and explained in the appraisal report.

(c) *Additional standards.* Nothing in this subpart shall prevent a regulated institution from requiring appraisals to conform to additional appraisal standards if deemed appropriate.

#### § 34.45 Appraiser independence.

(a) *Staff appraisers.* If an appraisal is prepared by a staff appraiser, that appraiser must be independent of the lending, investment or collection functions and not involved, except as an appraiser, in the federally related transaction, and have no direct or indirect interest, financial or otherwise, in the property. If the only qualified persons available to perform an

appraisal are involved in the lending, investment, or collection functions of the regulated institution, the regulated institution shall take steps to insure that the appraisers exercise independent judgment. Such steps include, but are not limited to, prohibiting an individual from performing an appraisal in connection with federally related transactions in which the appraiser is otherwise involved and prohibiting directors and officers from participating in any vote or approval involving assets on which they performed an appraisal.

(b) *Fee appraisers.* If an appraiser is prepared by a fee appraiser, the appraiser shall be engaged directly by the regulated institution or its agent, and have no direct or indirect interest, financial or otherwise, in the property or transaction.

#### § 34.46 Professional association membership; competency.

(a) *Membership in appraisal organizations.* A state certified appraiser or a state licensed appraiser may not be excluded from consideration for an assignment for a federally related transaction solely by virtue of membership or lack of membership in any particular appraisal organization.

(b) *Competency.* All staff and fee appraisers performing appraisals in connection with federally related transactions must be state certified or licensed, as appropriate. However, a state certified or licensed appraiser may not be considered competent solely by virtue of being certified or licensed. Any determination of competency shall be based upon the individual's experience and educational background as well as any other factors relating to the individual's competency to perform the particular appraisal assignment for which he or she is being considered.

#### § 34.47 Enforcement.

Institutions and institution-affiliated parties, including staff appraisers and fee appraisers, may be subject to removal or prohibition orders, cease and desist orders, and the imposition of civil money penalties pursuant to section 8 of the Federal Deposit Insurance Act, 12 U.S.C. 1818, as amended.

Dated: February 2, 1990.

Robert L. Clarke,

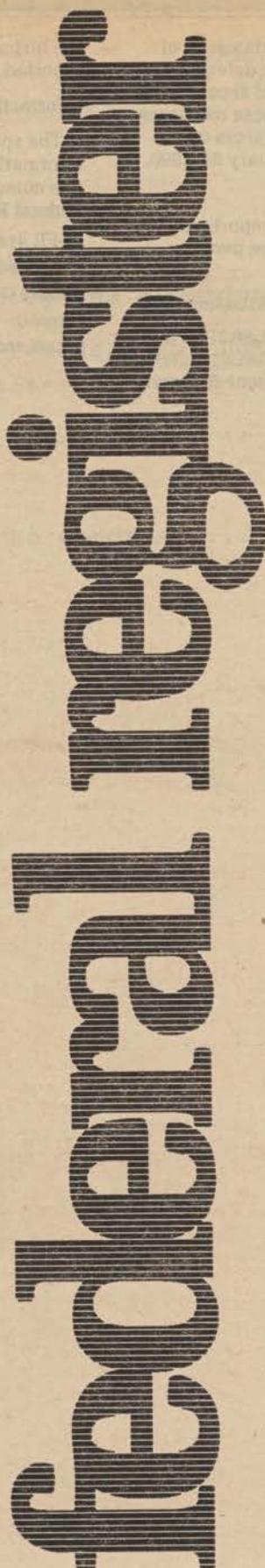
Comptroller of the Currency.

[FR Doc. 90-3624 Filed 2-15-90; 8:45 am]

BILLING CODE 4810-33-M



**Friday  
February 16, 1990**



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**Part VIII**

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**Office of  
Management and  
Budget**

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**Cumulative Report on Rescissions and  
Deferrals; Notice**

**OFFICE OF MANAGEMENT AND BUDGET****Cumulative Report on Rescissions and Deferrals**

February 1, 1990.

This report is submitted in fulfillment of the requirement of Section 1014(e) of the Impoundment Control Act of 1974 (Pub. L. 93-344). Section 1014(e) requires a monthly report listing all budget authority for this fiscal year for which, as of the first day of the month, a special message has been transmitted to Congress.

This report gives the status, as of February 1, 1990, of nine deferrals contained in the first and second special messages of FY 1990. These messages were transmitted to Congress on October 2, 1989 and January 29, 1990.

**Rescissions**

As of the date of this report, no rescission proposals were pending before Congress.

**Deferrals (Table A and Attachment A)**

As of February 1, 1990, \$8,271.5 million in budget authority was being deferred from obligation. Attachment A shows

the history and status of each deferral reported during FY 1990.

**Information from Special Messages**

The special messages containing information on the deferrals covered by this cumulative report are printed in the **Federal Register** as cited below:

54 FR 41410, Friday, October 6, 1989.

55 FR 3860, Monday, February 5, 1990.

*Richard G. Darman,  
Director.*

BILLING CODE 3110-01-M

TABLE A  
STATUS OF 1990 DEFERRALS

	<u>Amount</u> <u>(In millions</u> <u>of dollars)</u>
Deferrals proposed by the President.....	8,448.4
Routine Executive releases through February 1, 1990.....	-176.9
Overturned by the Congress.....	0
Currently before the Congress.....	8,271.5

**Attachments**

## Attachment A - Status of Deferrals - Fiscal Year 1990

As of February 1, 1990 Amounts in Thousands of Dollars Agency/Bureau/Account	Deferral Number	Original Request	Amount Transmitted Subsequent Change (+)	Date of Message	Cumulative OMB/Agency Releases (-)	Congres- sionally Required Releases (-)	Congres- sional Action	Cumulative Adjust- ments (+)	Amount Deferred as of 2-1-90
<b>FUNDS APPROPRIATED TO THE PRESIDENT</b>									
International Security Assistance Economic support fund.....	D90-1	271,000		10-02-89					
Foreign military financing.....	D90-1A		1,798,079	1-29-90	79,889				1,989,190
International military education and training.....	D90-8	4,156,642		1-29-90	21,000				4,135,642
	D90-9	23,293		1-29-90	23,293				0
<b>DEPARTMENT OF AGRICULTURE</b>									
Forest Service Expenses, brush disposal.....	D90-2	188,680		10-02-89					135,954
Cooperative work.....	D90-3	410,189		10-02-89					
	D90-3A		367,148	1-29-90					777,337
<b>DEPARTMENT OF DEFENSE - CIVIL</b>									
Wildlife Conservation, Military Reservations Wildlife conservation, Defense.....	D90-4		1,047	10-02-89					1,047
<b>DEPARTMENT OF HEALTH AND HUMAN SERVICES</b>									
Social Security Administration Limitation on administrative expenses (construction).....	D90-5		7,078	10-02-89					7,078
<b>DEPARTMENT OF STATE</b>									
Bureau for Refugee Programs United States emergency refugee and migration assistance fund, executive.....	D90-6 D90-6A		44	49,785	10-02-89 1-29-90				49,829

## Attachment A - Status of Deferrals - Fiscal Year 1990

Agency/Bureau/Account	Deferral Number	Original Request	Amount Transmitted	Subsequent Change (+)	Date of Message	Congres- sionally Required Releases (-)	Cumulative OMB/Agency Releases (-)	Congres- sional Action	Cumulative Adjust- ments (+)	Amount Deferred as of 2-1-90
<b>DEPARTMENT OF TRANSPORTATION</b>										
Federal Aviation Administration Facilities and equipment (Airport and airway trust fund).....	D90-7	502,361	673,064	10-02-89 1-29-90						1,175,425
<b>TOTAL, DEFERRALS.....</b>		<b>5,560,335</b>	<b>2,888,075</b>			<b>176,908</b>	<b>0</b>			<b>0</b>
										8,271,503

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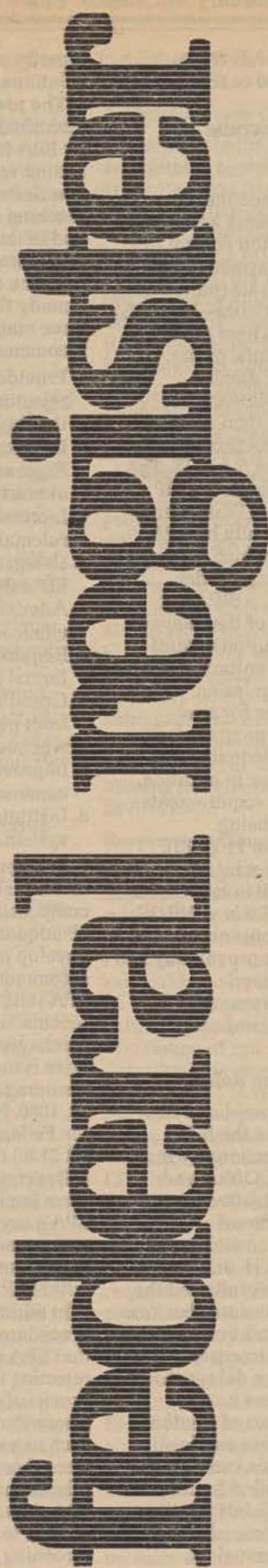
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**Friday  
February 16, 1990**



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## **Part IX**

# **Environmental Protection Agency**

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**40 CFR Part 51**

**State Implementation Plan Completeness  
Review; Final Rulemaking**

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 51**

[FRL-3702-9]

**State Implementation Plan Completeness Review****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rulemaking.

**SUMMARY:** This notice describes EPA's final action on the procedure for assessing whether a State implementation plan (SIP) submittal is adequate to trigger the Clean Air Act (Act) requirement that EPA review and take action on the submittal. The notice describes, among other things, the criteria for determining the "completeness" of the submittal. The EPA is concerned that uncertainty and excessive delays in reviewing SIP's frustrate the development of an optimum State/Federal partnership, cause confusion for sources regarding applicable regulations, and generally dampen initiative in State regulatory programs. Today's rulemaking provides a procedure and screening criteria to enable States to prepare adequate SIP submittals, and to enable EPA reviewers to promptly screen SIP submittals, and return incomplete submittals to the State for corrective action when adequate information is not provided with the submittal, without having to go through formal rulemaking. The EPA believes that this procedure should enable SIP submittals to be prepared and processed more efficiently and will improve the quality of SIP submittals. This notice also responds to comments received on the procedural changes the Agency made to its SIP review process. All of these reforms were discussed in two *Federal Register* notices of January 19, 1989 (54 FR 2138 and 54 FR 2214).

**DATES:** This action becomes effective March 19, 1990.

**ADDRESSES:** Materials relevant to this rulemaking have been placed in Docket No. A-88-18 by EPA and are available for inspection between 8:00 a.m. and 3:30 p.m., Monday through Friday, at the following address: Central Docket Section (A-130), Attn: Public Docket No. A-88-18, South Conference Center, Room 4, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. The EPA may charge a reasonable fee for copying.

**FOR FURTHER INFORMATION CONTACT:** Denise Gerth, Office of Air Quality Planning and Standards (MD-15), U.S. Environmental Protection Agency,

Research Triangle Park, NC 27711, Telephone (919) 541-5550 or (FTS) 629-5550.

**SUPPLEMENTARY INFORMATION:****Background**

The 1970 Act established the air quality management process as a basic philosophy for air pollution control in this country. Under this system, EPA establishes air quality goals (national ambient air quality standards—NAAQS) for common pollutants. There are now standards for six pollutants: ozone, carbon monoxide, sulfur dioxide, nitrogen dioxide, particulate matter (PM10), and lead. States then develop and submit to EPA control programs to attain and maintain these NAAQS. The EPA must then act on the State's SIP submittals. The individual State plans which are approved formally by EPA become the official SIP, which is legally enforceable by the Agency. Under section 110(a) of the Act, a SIP must demonstrate attainment of the relevant NAAQS, describe a pollution control strategy, contain legally enforceable regulations, include an emission inventory and procedures for new source review, outline a program for monitoring, and show adequate State implementation resources. In addition, there can be many other requirements specific to the pollutant being considered. Under section 110(a)(3), revisions to a SIP must not interfere with the ability of the SIP to meet these requirements. See, e.g., *Train v. NRDC*, 421 U.S. 60 (1975). The consequences of State failure to get SIP approval may be serious: they include Federal promulgation of substitute control regulations and federally imposed economic sanctions.

**Reason for SIP Processing Reform**

The EPA's previous procedures for review of each revision to the SIP mandated review of all actions by both the appropriate Regional Office and Headquarters. This duplicative review process resulted in significant processing delays and a considerable backlog of SIP actions in Headquarters requiring review. The EPA initiated the SIP processing reform measures because the SIP review process had become time consuming and resource intensive. The uncertainty and excessive delays that occurred in the SIP process have become continuing sources of friction between EPA and the State and local agencies. Prompted by this concern, the Deputy Administrator called for an assessment by senior officials familiar with the SIP processing procedures at EPA. A task force was formed to

identify problems and recommend solutions.

The problems that the task force identified centered on excessive concern by EPA for the potential precedent-setting value of individual SIP revisions, manifested by excessive delay in reaching decisions on many SIP actions and in uncertainty on the part of sources and State/local agencies as to the outcome of the SIP review process. To remedy the problems identified, the task force made the following recommendations:

1. Provide a mechanism for early rejection of incomplete submittals by the Regional Offices.
2. Develop a policy that allows the Regions to approve nonsubstantial actions by letter notice.
3. Increase the use of direct final rulemaking.
4. Delegate authority for final action on SIP submittals to the Regional Administrators for selected actions, eliminating Headquarters review.
5. Require more strict adherence to formal procedures.
6. Grandfather the basis for decisions from new EPA policies and rules whenever possible.
7. Improve guidance and communication.
8. Institute an improved management system.

In response to the recommendations of the task force, a work group composed of Regional Office and Headquarters staff was formed to develop programs to implement the recommendations of the task force. The EPA initiated the implementation of the recommendations through two mechanisms. First a series of directives were issued as internal policy memorandums. In addition, on January 19, 1989, EPA published two notices in the *Federal Register* (54 FR 2214 and 54 FR 2138) describing changes to EPA's SIP review procedures. The changes that were implemented focused on tailoring EPA's review to the significance of the action and adhering to established procedures for processing SIP actions within EPA.

In addition to revamping EPA review procedures, the task force recommended that EPA develop a mechanism for rejecting incomplete SIP submittals. Previously, unreviewable SIP actions (those that lacked basic information such as evidence of legal authority) went through full notice and comment rulemaking before being rejected. The EPA developed a set of completeness criteria to provide a procedure and screening criteria to enable States to

submit reviewable SIP revisions and to allow EPA to reject unreviewable submittals. The EPA believes that implementation of the SIP processing reform measures and promulgation of regulatory completeness criteria will ensure that the SIP's are processed in a more timely fashion and that the level of uncertainty regarding the status of SIP submittals should decrease, among other benefits.

### SIP Reform Initiatives

#### 1. Procedural Reforms

A key element in improving the review of SIP revisions submitted by the States is improving EPA's internal review procedures. A major component of the changes is delegation of the final approval authority for certain actions to the Regional Offices. The procedures established (see 54 FR 2214 for a detailed explanation) either eliminated or significantly reduced the amount of Headquarters review on generally routine or inconsequential SIP actions. As a result of implementing the reform measures, the publication of EPA actions during the eight-month period from January 19, 1989 to September 19, 1989 was substantially increased over the same period during the previous two years (see Table 1 below).

TABLE 1.—NUMBER OF SIP ACTIONS PUBLISHED

Period	Headquarters	Regional office	Total
1/19/87-9/19/87 ....	139	0	139
1/19/88-9/19/88 ....	153	0	153
1/19/89-9/19/89 ....	130	100	230

To date, few problems have been identified with actions either not reviewed or minimally reviewed by Headquarters.

#### 2. Completeness Review

Under the completeness criteria, EPA will review a SIP for completeness when it is initially submitted to determine if all the necessary components have been included to allow EPA to properly review and act on the substance of a submittal. This will be a quick screen to determine the reviewability, rather than the approvability, of the SIP submittal.

On March 18, 1988, a policy for determining completeness was issued by Gerald A. Emison, Director, Office of Air Quality Planning and Standards, to the Regional Offices. A copy of this document has been placed in the docket (#II-B-4) which includes sample letters for accepting and rejecting SIP submittals. This rulemaking, as

published today, replaces that policy memorandum.

#### 3. Completeness Criteria

The criteria for determining whether a submittal is complete have been separated into two categories: (1) Administrative information and (2) technical information. The administrative information required are those documents that demonstrate that the State has followed the administrative requirements set out by the Act for adoption of State rules for incorporation into the SIP. The technical information required by the criteria is intended to identify the environmental impact of the revision.

When a submittal is determined to be complete, EPA will inform the State by letter of its determination and the proposed processing schedule. The EPA will then begin the formal review for approvability. If a submittal is determined to be incomplete, the submittal will be returned to the State with a letter listing the deficiencies. The Regional Office will notify the State of the completeness determination, generally within 45 days of receipt of the submittal. The EPA will not conduct further rulemaking on incomplete submittals until the State provides any missing material needed to facilitate EPA review.

#### Response to Comments

On January 19, 1989, EPA published the completeness review proposed rulemaking (54 FR 2138) and also a notice of internal procedural changes (54 FR 2214). The purpose of the proposed rulemaking was to describe the completeness review criteria and to solicit public comments on the criteria. The notice of procedural changes described the changes that were being implemented in the way SIP revision requests were processed at EPA. The notice of internal procedural changes was effective immediately; however, EPA invited the public to comment on the changes. The public was given 45 days to comment on both the proposed rule and notice of procedural changes (until March 6, 1989). Two commenters requested that EPA extend the comment period on both actions by 30 days. Although EPA did not officially extend the comment period, both commenters were contacted and informed that any additional comments they submitted to EPA by April 6, 1989 would be considered when the final rule was published. Both commenters submitted additional comments and they were considered during the preparation of this document. A total of 20 commenters submitted comments on the SIP reform

Federal Register notices. Comments were received from private industry, State and local air pollution control agencies, the Utility Air Regulatory Group, and a Chamber of Commerce. Since numerous comments were received from the commenters, a complete response to all significant comments, entitled "Summary of Comments and Responses on the January 19, 1989 SIP Reform Federal Register Notices," has been placed in the Docket #A-88-18. However, several major comments that were submitted to EPA are discussed below.

#### 1. Authority to Delegate

*Comment:* One commenter argued that EPA lacks authority to delegate final responsibility for action on SIP submittals to the Regional Administrators because such action constitutes rulemaking.

*Response:* The Administrator has delegated responsibility for final action on certain categories of SIP revisions to the Regional Administrators under the authority of section 301(a), which provides that the Administrator may delegate any of his responsibilities under the Act "except the making of regulations." As the commenter correctly points out, EPA originally concluded in the early 1970's that final action on SIP submittals constituted the making of regulations within the meaning of section 301(a). However, as explained in the notice of proposed rulemaking (NPR), the Agency subsequently concluded, after further review in the context of this rulemaking, that such action did not constitute the "making of regulations" within the meaning of section 301(a), and thus was not subject to that section's bar on delegation. The commenter argues that the final action on a SIP is rulemaking within the meaning of the Administrative Procedures Act (APA), and it is thus necessarily the making of regulations within the meaning of section 301(a). The EPA now concludes, however, that these two categories are not identical. As noted in the NPR, EPA has acquiesced in the line of judicial decisions holding that final action on SIP submittals is rulemaking within the meaning of the APA, and is subject to all of the APA's procedural requirements. The fact that the Administrator may be conducting proceedings that may be characterized procedurally as rulemaking does not imply that in all cases he is "making regulations." The EPA believes that the Administrator is making regulations within the meaning of section 301(a) only when he promulgates Federal regulations. Thus,

any national regulations, including Federal implementation plans promulgated by the Administrator under section 110(c), would constitute the making of regulations subject to the statutory bar on delegation. In contrast, EPA believes that when it takes final action under section 110(a) on SIP revisions submitted by the States the Agency is not making regulations, but is merely approving or disapproving regulations previously made at the State level and submitted to EPA for incorporation into the federally-approved SIP.

#### *2. Authority to Return Incomplete SIP's under the Act*

**Comment:** Two commenters questioned EPA's authority under the Act to refuse to further process SIP submittals that it considers incomplete.

**Response:** The Clean Air Act does not define the terms "plan" in section 110(a)(1) and (2) and "revision" in section 110(a)(3). As described in the NPR, EPA is interpreting the words "plan" and "revision" to refer only to those State submittals that contain all of the components necessary to allow EPA to adequately review and take action on such plans or revisions under section 110 (and Part D where applicable). Based upon the structure and purposes of the Act as a whole, EPA concludes that Congress could not have intended the Agency to expend resources reviewing and taking action through full scale rulemaking on SIP submittals that were simply not reviewable because they were lacking essential elements. Under this interpretation of the words "plan" and "revision," sections 110(a)(1), (2), and (3) only require EPA to act on complete SIP submittals. The Agency is thus free to return incomplete submittals to the States for completion prior to further processing. Further, section 301 of the Act authorizes the Administrator to promulgate such regulations as are necessary to carry out his functions under the Act. Having determined that the Act requires EPA to act only on complete submittals and considering the need to reduce the overwhelming SIP submittal backlog and to inform States in advance of which submittals EPA would regard as complete, EPA believes that it is necessary for the Agency to promulgate regulations defining criteria for a complete submittal.

#### *3. Additional information requirements*

**Comment:** Several commenters felt that the completeness criteria impose additional information collection requirements on the State and local agencies and additional time and

resources would be needed to compile and package these materials.

**Response:** The EPA does not believe that any of the requirements outlined in the completeness criteria are new. However, as noted in the January 19, 1989 *Federal Register* notice, many States have not been submitting this information and might view these requirements as new. In many cases in the past, EPA expended a substantial amount of resources attempting to obtain the relevant information from the State, which resulted in processing delays not only in the subject action, but in other actions that could have been processed. The requirements cover the basic information necessary for determining whether a SIP submittal is reviewable. When this information was not submitted to EPA in the past, the SIP submittals went through the entire review process only to be disapproved months later because they lacked some essential element whose absence was obvious from the start. Although some of the information that EPA is requesting under the completeness criteria may be in the public domain, the States have the responsibility under the Act to submit it to EPA as part of their official submittal in order for EPA to fully evaluate the submittal. Often in the past, EPA was able to acquire these data on its own to facilitate SIP processing, but this approach was extremely time and resource intensive and contributed to the existing SIP backlog situation.

#### *4. Time Frames for Making Completeness Determinations*

**Comment:** Numerous comments were received stating that EPA should specify the time in which it will make a completeness determination. A commenter stated that if EPA does not notify the State in the specified time, EPA should be required to act on the submittal.

**Response:** The EPA has established a time frame for making completeness determinations. Generally, a Regional Office will make a completeness determination in 45 days. In some instances, a completeness determination may take longer than 45 days. For example, when a State submits an ozone attainment plan, EPA may take longer than 45 days to determine completeness because of the large amount of information that accompanies such a plan. Where EPA believes that it will be unable to complete the review within 45 days, EPA will notify the State of that fact. In other cases, such as when a State submits a recodification of a regulation, EPA may make a completeness determination in significantly less than 45 days. The EPA

has developed an oversight program and a management system to ensure the integrity of the SIP reform measures. A part of the oversight program will be to review the time frames in which the Regional Offices make completeness determinations. If deviations from the suggested processing procedures occur, EPA Headquarters will work with the specific Regional Office to resolve the delay. The EPA cannot commit to take full action on any SIP submittal as to which the Agency fails to make a completeness determination within 45 days, for the simple reason that EPA may not be able to adequately review such submissions if they are, in fact, incomplete. In such cases EPA would then have to proceed to disapproval, based on the inadequacy of the submission, which is the very situation EPA is trying to avoid in promulgating the completeness criteria.

#### *5. Four-Month Time Frame*

**Comment:** Some commenters maintained that, contrary to EPA's statements in the January 19, 1989 proposal, EPA must act on SIP revisions within the 4-month period applicable to initial SIP's submitted in response to a new or revised national ambient air quality standard.

**Response:** EPA disagrees that the 4-month deadline applicable to initial SIP's under sections 110(a)(1) and (2) of the Act also applies to SIP revisions submitted under section 110(a)(3). The EPA is currently presenting its views on that subject to the U.S. Supreme Court in *General Motors Corporation v. U.S.*, No. 89-369, and refers the reader to the brief filed on behalf of the Agency in that case.

The inapplicability of the 4-month period to SIP revisions, however, does not leave EPA free under the law to delay action on SIP revision submittals indefinitely, to suit the convenience of the Agency. Rather, EPA is subject to the general APA requirement that agencies conclude matters "within a reasonable time" and to potential judicial orders under the APA to compel agency action "unreasonably delayed \*\*\*" 5 U.S.C. section 555(b), 5 U.S.C. section 706(1).

As described in the January 19, 1989 notice, several years before the recent SIP processing reforms took effect, the Agency issued internal guidelines setting a 14-month timetable for decisions on most proposed SIP revisions. The EPA, Office of Air Quality Planning and Standards, Guidance on Processing SIP Revisions (and 111(d) Plans) III-1 through III-5 (1985). This schedule was based on a

"5/2-5/2" system under which, at both the proposed and final stages of SIP rulemaking, the EPA Regional Office would take up to 5 months to review and process State submissions and public comments and prepare a draft **Federal Register** notice for submittal to EPA Headquarters, and Headquarters would then take up to 2 months to review, comment on, and revise the Regional Office submittal. As explained in the January 19, 1989 notice, for relatively noncontroversial SIP submittals, EPA used only a single "direct-final" rulemaking stage, which generally eliminated the proposal phase of the process, thereby reducing the 14-month period by one-half.

During the mid-1980's, EPA experienced a severe crush of SIP revision submittals. Notwithstanding this crush, the Agency was able to process more than 1600 SIP-related actions from 1983 until the end of 1988, an average of almost 350 per year. But the heavy burden of reviewing so many submittals took its toll by lengthening the time for SIP reviews in many cases to well beyond the 14-month timetable. This in turn convinced EPA to institute the reforms initiated January 19, 1989, and discussed in today's rule.

One effect of those reforms is to revise the Agency's views (and hence its pre-existing guidance) on what presumptively constitutes a "reasonable time" for EPA action on SIP-revision submittals. While the reforms affect how much time for EPA action would be "reasonable", however, they do not reduce the quality of substantive review that is necessary before the often detailed, technically complex submittals may be approved into the applicable plan. This substantive review is necessarily extensive, particularly since the passage of the 1977 Amendments added a host of new plan requirements applicable to SIP revisions for areas that are designated "nonattainment" for a particular pollutant.

When a State submits a revision, the Regional Office first must make certain that the plan contains all the necessary elements required by section 110(a)(2) and parts C or D of the Act, EPA's regulations under 40 CFR part 51, and the extensive Agency interpretive guidance further elaborating upon the statutory and regulatory requirements. If the submittal is missing certain elements or contains unacceptable ambiguities the Regional Office must decide whether to simply disapprove it or, where the deficiencies are less problematic and the State is cooperative, ask the State to make the necessary corrections and submit it again.

EPA then must judge whether the revision may be approved. These judgments are often highly technical in nature, involving questions such as whether increased air pollution resulting from the revision will prevent or interfere with an area's effort to attain the NAAQS or achieve reasonable further progress (RFP) towards attainment, see 42 U.S.C. sections 7410(a)(1) and 7502(b)(3); whether the revision ensures that the affected source or sources will employ reasonably available control technology (RACT), see 42 U.S.C. section 7502(b) (2) and (3); and whether the myriad of provisions relating to permits for new and modified major stationary sources have been followed, see 42 U.S.C. sections 7502(b)(6) and 7503. In determining whether these requirements have been met, the Agency often must determine whether complex air quality modeling guidelines have been completely followed, and the results of that modeling applied correctly. EPA's technical support document analyzing questions such as these may necessarily be scores of pages long. This technical support is necessary because EPA's action on SIP revisions is often challenged by affected parties. The Regional Office must also formulate a public docket of all materials relating to the SIP revision, and must draft a **Federal Register** notice proposing to approve or disapprove the revision. After public comments are submitted, the Agency must respond to all significant comments and provide a clear statement of basis and purpose for its action in the preamble to the final rules. 5 U.S.C. section 553(c).

For matters of national importance, the Regional Office must consult with other Regions and Headquarters to try to assure national consistency. In addition, staff in the air program's compliance office determine whether the rules are enforceable as written, and Agency lawyers determine whether the requirements of the Administrative Procedures Act and the Clean Air Act have been met.

As explained below, the period of time EPA would now consider "reasonable" for acting on SIP revisions varies according to the internal and public process EPA will follow under the reforms for each type of revision. Under the reforms, EPA has divided SIP submittals into 3 groups, listed in the January 19, 1989 notice as Table I, Table II, and Table III submittals. Table III submittals are those that, though of potentially great importance for individual pollution sources, will not have a great impact on the

implementation of the national air quality management program. Under the delegation of authority from the Administrator to the Regional Administrators, the Regional Administrators may take final action on Table III submittals without further action by EPA Headquarters, including the Administrator. As a result, the 4 months of Headquarters review previously applicable to those submittals is eliminated. The Regional Offices can perform the tasks described above and complete action on those submittals in 5 months at each of the 2 phases of rulemaking—proposal and final—for a total of 10 months. The portion of the submittals under Table III that are entirely noncontroversial, and hence can be processed as "direct-finals", will generally require only one-half that time, or 5 months. Beyond that, some Table III submittals will be so inconsequential that public notice of EPA's action on them would serve no useful purpose. The EPA will invoke the APA section 553(b) "good cause" exemption for those submittals, and under the delegation discussed in the January 19, 1989 notice, act on them through a "letter notice" procedure at the Regional Office level alone. Since such actions should require little review or other work, they should presumably take approximately 3 months.

The types of submittals listed in Table II of the January 19, 1989 notice generally need only cursory Headquarters review because they have only a marginally greater impact on the implementation of the national air quality management program than do Table III SIP revisions. In some cases, the guidance applicable to these submittals is relatively new and, thus, it is prudent for Headquarters at least to monitor the Regional Office decision process. Although the Regional Administrators have authority to act alone on these SIP's, Headquarters generally takes 30 days from the date a Table II SIP revision package is received from the Regional Office to send comments to the Regional Office. The processing for such actions generally should occur as follows:

(1) Regional Office review of actions and preparation of **Federal Register** notice—4 months.

(2) Headquarters opportunity for comment—1 month.

(3) Completion of Regional Office review and action—1 month. This process totals 6 months at each stage of the rulemaking, or a total of 12 months. For those Table I actions that are noncontroversial and, hence, eligible for "direct-final" rulemaking, the

applicable period would be a total of 6 months.

Actions classified in Table I (those actions with broad national significance) will continue to receive the full review of both the Regional Offices and Headquarters. Although the reduction of the Headquarters burden resulting from the SIP processing reforms should allow Headquarters to devote more time to Table I actions, those actions are the most complicated and have potentially the greatest impact on EPA air quality management programs. The Agency will continue to strive to complete such actions within the "5/2-5/2" schedule. The EPA review of these submittals may, however, need to be extended in some cases well beyond the 14-month period because of their complexity and importance. For example, SIP revision submittals that raise issues of great national importance or of first impression may be reviewed by EPA's other Regional Offices, in addition to requiring more extensive review and analysis by EPA Headquarters. Other SIP revisions are based upon complex air quality modeling, which may raise a host of

technical questions; or the revisions may be "relaxations" that could result in increased emissions of air pollutants, which would require EPA to scrutinize even more closely whether the plan would still meet all the requirements of the Act. For these and other reasons, EPA expects that Agency review of some SIP submittals will require more than 14 months.

The time frames described above are summarized in the table below. These periods will not begin to run until the submittal by the State is "complete", as that term is defined in today's regulation. The periods for EPA action listed in the table will not apply at all to submittals that are initially incomplete and remain incomplete.

Beyond that, the time frames for action on Table II (require some national review) and Table III (regionally important/moderate national significance) submittals include no time for review by the Office of Management and Budget under Executive Orders 12291 and 12612. The OMB has granted a temporary exemption from review under those Orders for Table II and Table III actions. The temporary exemption

expires on December 31, 1990. Should OMB not extend the exemption permanently, the attached time frames for action on those types of submittals will need to be revised to incorporate the additional review.

Finally, the time frames discussed here are suggested as presumptively reasonable periods for EPA action on SIP submittals. The Agency believes that these schedules are achievable for most of the actions identified. The processing time for each action, however, necessarily will depend on the complexity of the action. For example, any submittal that does not meet EPA policy or regulations will require extra attention. In some cases, it is more appropriate for EPA to work with the State to correct deficiencies rather than formally disapprove a State submittal. Moreover, the results of inter-agency review of SIP submittals, within the Executive Branch, are unpredictable. While EPA will endeavor to respond to concerns raised by other agencies within the schedules described here, in some cases an adequate response will require an extension of those schedules.

#### PRESUMPTIVE PERIODS FOR EPA ACTION ON SIP SUBMITTALS

Action type	Proposal		Final		Total
	Regional office	Headquarters	Regional office	Headquarters	
Table I .....	5 months.....	2 months.....	5 months.....	2 months.....	14 months.
Table II/General .....	5 months.....	1 months.....	5 months.....	1 months.....	12 months.
Table II/Direct, Final Rulermaking.	.....	.....	5 months.....	1 month.....	6 months.
Table III/ General.	5 months.....	.....	5 months.....	.....	10 months.
Table III/Direct, Final Rulermaking.	.....	.....	5 months.....	.....	5 months.
Table III/Letter, Notice.	.....	.....	3 months.....	.....	3 months.

#### 6. Finality and Effect of a Finding of Incompleteness

**Comment:** Several commenters expressed concern about the finality and effect of a finding of incompleteness. Three commenters questioned whether a finding of incompleteness would be reviewable final action under section 307(b). Two commenters felt that a procedure should be established for resolving disputes over the completeness of a submittal and for appealing EPA's determination of incompleteness.

**Response:** A determination by EPA that a SIP submittal is incomplete would constitute final Agency action subject to judicial review under section 307(b). Section 307(b) authorizes courts to

review "any other final action of the Administrator under this Act [including any denial or disapproval by the Administrator under Title I]." A finding of incompleteness would be a final action on the incomplete submittal, because unless the State supplemented the submittal EPA would take no further action on the proposed SIP revision. The EPA does not believe that it is necessary to provide a mechanism for dispute resolution or appeal of completeness determinations at this time. The EPA has proposed the completeness criteria to establish clear requirements for SIP submittals and to speed SIP processing. An appeal process would only make completeness determinations more cumbersome and time consuming. A State or member of the public may

always seek judicial review of a determination of incompleteness if the State does not wish to supplement a submittal as requested by EPA. Should EPA discern at some future date a significant problem with completeness determinations made at the regional level, it might reconsider the need for an appeals process at that time.

#### 7. Requirements for Responding to Public Comments

**Comment:** Commenters questioned whether the completeness criteria were requiring the States to respond to every public comment.

**Response:** The completeness criteria does not impose any substantive requirements for submission of plans or

plan revisions on the States. It is not EPA's intention to require the States to respond to each comment that they receive on a rule at their public hearings. However, to the extent that a State responds to public comments, the responses should be submitted to EPA with the plan/plan revision. Generally, if an action generates substantial public interest, the State would address the comments before adopting the regulation. Where comments are significant, States must adequately respond to them to avoid arbitrary rulemaking.

#### 8. Modeling Requirements

**Comment:** Several commenters stated that modeling is presently not required with every SIP revision and should not be required for SIP revisions that reduce emissions or strengthen existing rules. In the commenters' opinion, to require modeling with each SIP revision is unnecessary and would place a burden on State and local agencies. One commenter stated that modeling costs and resources can outweigh the benefits in some cases. Commenters indicated that modeling would not be useful for volatile organic compound (VOC) and nitrogen oxide (NO<sub>x</sub>) rules to determine impacts of ozone levels. Another commenter stated in some instances (small area source VOC substitutions), a demonstration of one to one (or better) emissions credits can obviate formal modeling.

**Response:** The EPA agrees that there are some limited circumstances where it is clear that the national ambient air quality standards will be protected and that ambient concentrations will improve, or at least not degrade, at all points and times as a result of the SIP change and a modeling demonstration may not be necessary. In those cases, EPA would regard the modeling as not being "required" within the meaning of the Completeness Criteria [see section 2.2(e)]. EPA may at a later date issue a *Federal Register* notice discussing the instances in which modeling would be required.

#### 9. Submission of Marked Up Copy of Regulation

**Comment:** Several commenters stated that requiring submission of a marked-up copy of a regulation compared to the approved SIP is inappropriate. Because of the backlog of SIP's at EPA, revisions may take up to four years before final publication. Instead, commenters felt that it is appropriate for the State to submit a marked-up copy of a regulation compared to their previously effective/submitted rule. The EPA should be

required to keep track of pending submittals, not the State.

**Response:** Because of the SIP backlog at EPA, EPA agrees that it is not practical for the State to submit rules indicating the changes compared to the latest approved SIP. The EPA will accept rules which indicate the changes made by the adopting agency compared to the last version submitted to EPA for inclusion in the SIP. However, when the backlog has been removed, EPA will then expect that the marked version of the rule will indicate changes compared to the approved SIP rule. EPA has clarified the intent of the final rule at 2.3.1(c) to require draft rules submitted for parallel processing to also indicate changes from the EPA approved regulations.

#### 10. Letter Notice Procedures

**Comment:** EPA received a number of comments on the new SIP processing procedure referred to as "letter notice". One commenter suggested that the Agency consider wider use of the procedure for actions expected to generate little public interest. In contrast, another commenter urged EPA to abandon the new approach since the commenter felt that it was unclear when letter notice versus direct final processing should be used. Finally, one commenter indicated that the agency should provide prompt and complete notice of all letter notice actions in the *Federal Register*. This same commenter also questioned the time EPA would take to review letter notice SIPs.

**Response:** EPA instituted the letter notice procedure to facilitate rapid processing of actions expected to generate no public interest. As noted in the NPR, under this new procedure EPA is providing no opportunity for public comment in reliance on the exception from the notice and comment requirements of the Administrative Procedures Act (APA) for instances where public participation would be unnecessary or contrary to the public interest. Thus, EPA will consider using the procedure in all cases that are expected to generate no public interest, but cannot expand the procedure to cover those actions that will generate little interest, but may generate some comment. Such actions will be processed under the direct final procedure, which is designed for actions that, although of some public interest, are not expected to generate any adverse public comment. Although the Agency cannot detail precisely those types of actions that will be processed under each procedure, these guidelines on expected public input will aid Regional Offices in determining which

procedure is appropriate for a given action. Letter notice will generally be used for more procedural and technical amendments, while direct final will be used for routine, noncontroversial substantive changes.

EPA does intend to provide prompt notice of all letter notice actions in the *Federal Register*. The Regional Offices have recently been instructed to publish notice of all letter notice actions in the *Federal Register* every three months. Incorporation by reference of any changes in the regulatory language of a SIP into the Code of Federal Regulations will be done at this time. EPA notes that under the APA (5 U.S.C. Section 552(a)) actions not published in the *Federal Register* may not be effective as to any individual who does not have actual notice of them. Thus, although as indicated in the NPR the effective date of letter notice actions will be the date of the letter to the State and any directly affected individuals as to those receiving such letters, the effective date of such actions as to the general public will be the date of the subsequent summary publication notice in the *Federal Register*. Finally, EPA can not estimate at this time the length of time it will take the agency to process actions under the new letter notice procedure. EPA anticipates that processing times will be significantly shorter than under traditional SIP processing procedures, and could be as short as several months. Regional Office experience with the procedure should facilitate even faster processing in the future.

#### Conclusion

The EPA has thoroughly evaluated all comments submitted with regard to the notice of internal procedural changes and the notice of proposed rulemaking. Some interpretations of the meaning of certain aspects of these notices are appropriate (see "Summary of Comments and Responses on the January 19, 1989 SIP Reform *Federal Register* Notices" and discussion of significant comments presented above). However, EPA is not persuaded by any of the arguments presented to change either the proposed regulatory changes to 40 CFR part 51 or the internal procedural changes. Therefore, by this notice, EPA is promulgating the previously proposed changes to 40 CFR part 51 which require that all submissions of revisions to the SIP meet the criteria of 40 CFR part 51, Appendix V. The failure of such submittals to meet these requirements will result in a determination that such a submission is not a revision to the official plan in the

context of the Act and will not be further reviewed by EPA.

With specific regard to the internal procedures, EPA, as a part of the overall oversight program, will continue to evaluate the efficacy of the procedures to meet the goal of expedited processing of revisions to the SIP. The EPA will adopt changes to the procedures as appropriate, with public notice to be provided in the **Federal Register** where there may be significant public interest.

#### Administrative Requirements

The docket is an organized and complete file of all the information considered by EPA in the development of these SIP processing changes. The docket is a dynamic file because material is added throughout the notice preparation and comment process. The docketing system is intended to allow members of the public and industries involved to identify and locate documents so that they can effectively participate in the process.

The information collection requirements of these changes are considered to be no different than those currently required by the Act and established EPA procedures. Thus, the public reporting burden resulting from today's notice is estimated to be unchanged from existing requirements. The public is invited to send comments regarding the burden estimate or other aspect of information collection, including suggestions for reducing any burden, to the docket and to the following: Chief, Information Policy Branch, PM-223, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, marked "Attention: Desk Officer for EPA."

Under Executive Order 12291, EPA is required to judge whether an action is "major" and therefore subject to the requirement of a regulatory impact analysis (RIA). The Agency has determined that the SIP processing changes made final today would result in none of the significant adverse economic effects set forth in section 1(b) of the Order as grounds for a finding that an action is "major." The Agency has, therefore, concluded that this action is not a "major" action under Executive Order 12291. This rule was submitted to the Office of Management and Budget (OMB) for review under Executive Order 12291.

A copy of the draft rule as submitted to the OMB, any documents accompanying the draft, any written comments received from other agencies (including OMB), and any written

responses to these comments have been included in the docket.

The Regulatory Flexibility Act of 1980, 4 U.S.C. 601-612, requires the identification of potentially adverse impacts of Federal actions upon small business entities. The Act requires the completion of a regulatory flexibility analysis for every action unless the Administrator certifies that the action will not have a significant economic impact on a substantial number of small entities. For the reasons described above, I hereby certify that the final rule will not have a significant impact on a substantial number of small entities.

Under section 307(b)(1) of the Act, petitions for judicial review of the portion of this action promulgating the completeness criteria must be filed in the United States Court of Appeals for the District of Columbia Circuit by (60 days from date of publication). That action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

Dated: February 14, 1990.

William K. Reilly,  
Administrator.

#### List of Subjects in 40 CFR Part 51

Administrative practice and procedure: air pollution control; reporting and recordkeeping requirements.

For the reasons set out in the preamble, 40 CFR part 51 is amended as follows:

40 CFR part 51 is amended as follows:

#### PART 51—[AMENDED]

1. The authority citation for part 51 continues to read as follows:

**Authority:** This rulemaking is promulgated under authority of Sections 101(b)(1), 110, 160-69, 171-178, and 301(a) of the Clean Air Act, 42 U.S.C. 7401(b)(1), 7410, 7420-7429, 7501-7508, and 7601(a).

2. Section 51.103 is amended by revising paragraph (a) to read as follows:

##### § 51.103 Submission of plans, preliminary review of plans.

(a) The State makes an official plan submission to EPA only when the submission conforms to the requirements of Appendix V to this part, and the State delivers five copies of the plan to the appropriate Regional Office, with a letter giving notice of such action. The State must adopt the plan and the Governor or his designee must submit it to EPA as follows:

\* \* \* \* \*

3. Part 51 is amended by adding Appendix V to read as follows:

#### Appendix V—Criteria for Determining the Completeness of Plan Submissions

##### 1.0. Purpose

This Appendix V sets forth the minimum criteria for determining whether a State implementation plan submitted for consideration by EPA is an official submission for purposes of review under § 51.103.

1.1. The EPA shall return to the submitting official any plan or revision thereof which fails to meet the criteria set forth in this Appendix V, or otherwise request corrective action, identifying the component(s) absent or insufficient to perform a review of the submitted plan.

1.2. The EPA shall inform the submitting official when a plan submission meets the requirements of this Appendix V; such determination means that the submission is an official submission for purposes of section 51.103.

##### 2.0. Criteria

The following shall be included in plan submissions for review by EPA:

###### 2.1. Administrative Materials

(a) A formal letter of submittal from the Governor or his designee, requesting EPA approval of the plan or revision thereof (hereafter "the plan").

(b) Evidence that the State has adopted the plan in the State code or body of regulations; or issued the permit, order, consent agreement (hereafter "document") in final form. That evidence shall include the date of adoption or final issuance as well as the effective date of the plan, if different from the adoption/issuance date.

(c) Evidence that the State has the necessary legal authority under State law to adopt and implement the plan.

(d) A copy of the actual regulation, or document submitted for approval and incorporation by reference into the plan, including indication of the changes made to the existing approved plan, where applicable. The submittal shall be a copy of the official State regulation/document signed, stamped, dated by the appropriate State official indicating that it is fully enforceable by the State. The effective date of the regulation/document shall, whenever possible, be indicated in the document itself.

(e) Evidence that the State followed all of the procedural requirements of the State's laws and constitution in conducting and completing the adoption/issuance of the plan.

(f) Evidence that public notice was given of the proposed change consistent with procedures approved by EPA, including the date of publication of such notice.

(g) Certification that public hearings(s) were held in accordance with the information provided in the public notice and the State's laws and constitution, if applicable.

(h) Compilation of public comments and the State's response thereto.

###### 2.2. Technical Support

(a) Identification of all regulated pollutants affected by the plan.

(b) Identification of the locations of affected sources including the EPA attainment/nonattainment designation of the

locations and the status of the attainment plan for the affected area(s).

(c) Quantification of the changes in plan allowable emissions from the affected sources; estimates of changes in current actual emissions from affected sources or, where appropriate, quantification of changes in actual emissions from affected sources through calculations of the differences between certain baseline levels and allowable emissions anticipated as a result of the revision.

(d) The State's demonstration that the national ambient air quality standards, prevention of significant deterioration increments, reasonable further progress demonstration, and visibility, as applicable, are protected if the plan is approved and implemented.

(e) Modeling information required to support the proposed revision, including input data, output data, models used, justification of model selections, ambient monitoring data used, meteorological data used, justification for use of offsite data (where used), modes of models used, assumptions, and other

information relevant to the determination of adequacy of the modeling analysis.

(f) Evidence, where necessary, that emission limitations are based on continuous emission reduction technology.

(g) Evidence that the plan contains emission limitations, work practice standards and recordkeeping/reporting requirements, where necessary, to ensure emission levels.

(h) Compliance/enforcement strategies, including how compliance will be determined in practice.

(i) Special economic and technological justifications required by any applicable EPA policies.

### 2.3. Exceptions

2.3.1. The EPA, for the purposes of expediting the review of the plan, has adopted a procedure referred to as "parallel processing." Parallel processing allows a State to submit the plan prior to actual adoption by the State and provides an opportunity for the State to consider EPA comments prior to submission of a final plan for final review and action. Under these circumstances, the plan submitted will not be able to meet all of the requirements of

paragraph 2.1 (all requirements of paragraph 2.2 will apply). As a result, the following exceptions apply to plans submitted explicitly for parallel processing:

(a) The letter required by paragraph 2.1(a) shall request that EPA propose approval of the proposed plan by parallel processing.

(b) In lieu of paragraph 2.1(b) the State shall submit a schedule for final adoption or issuance of the plan.

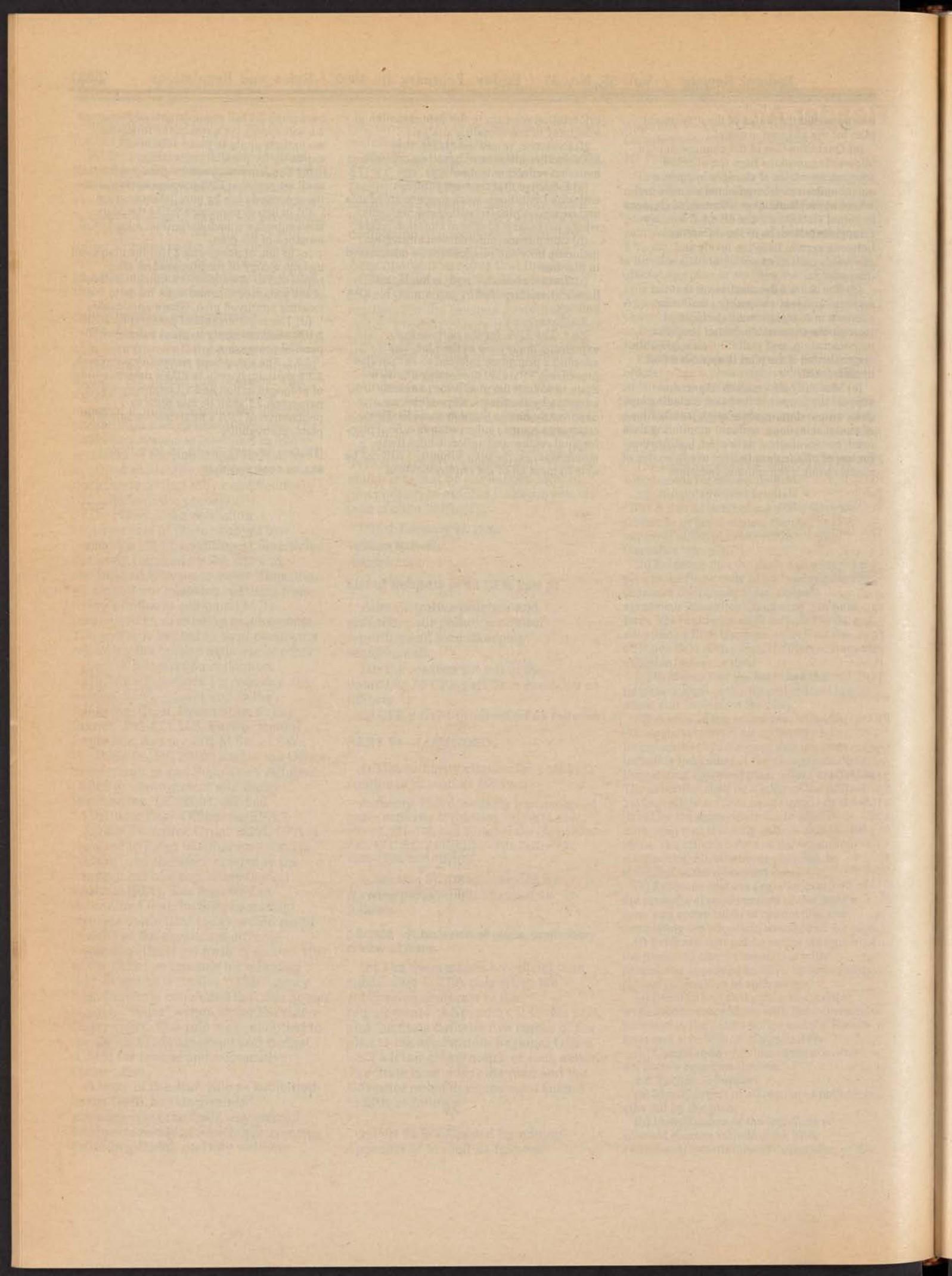
(c) In lieu of paragraph 2.1(d) the plan shall include a copy of the proposed/draft regulation or document, including indication of the proposed changes to be made to the existing approved plan, where applicable.

(d) The requirements of paragraphs 2.1(e)-2.1(h) shall not apply to plans submitted for parallel processing.

2.3.2. The exceptions granted in paragraph 2.3.1 shall apply only to EPA's determination of proposed action and all requirements of paragraph 2.1 shall be met prior to publication of EPA's final determination of plan approvability.

[FR Doc. 90-3893 Filed 2-15-90; 9:12 am]

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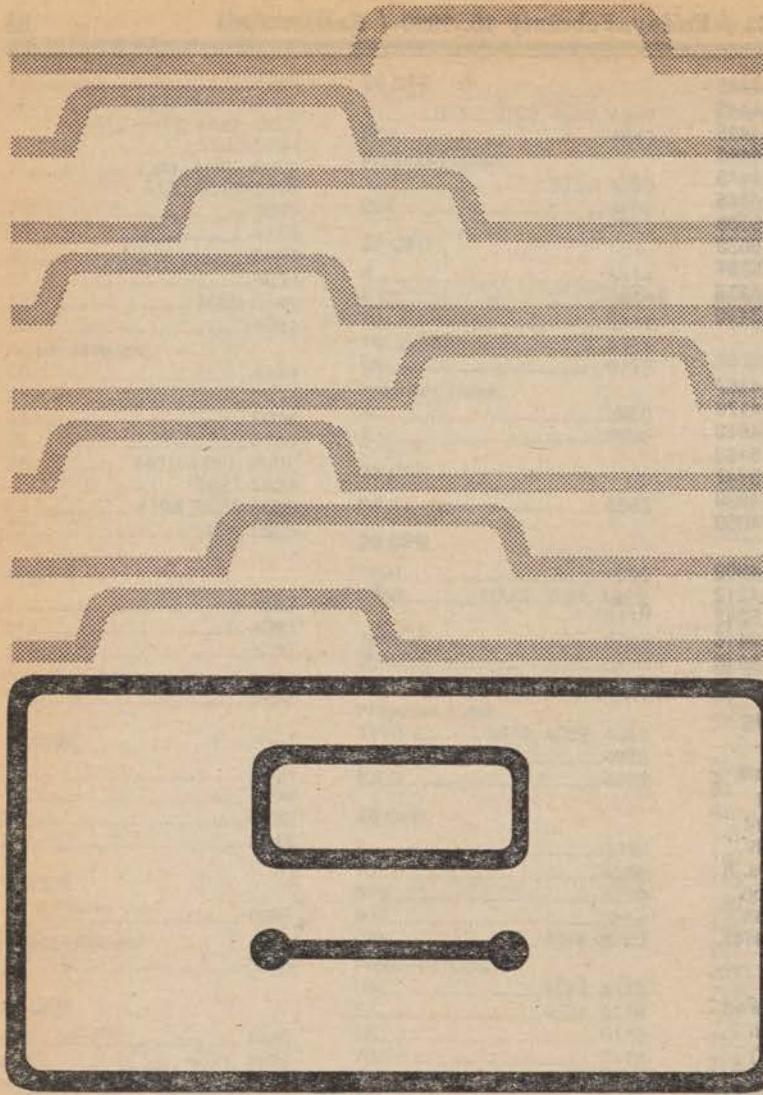
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# Guide to Record Retention Requirements

## in the Code of Federal Regulations (CFR)

GUIDE: Revised January 1, 1989

SUPPLEMENT: Revised January 1, 1990

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The various abstracts in the GUIDE tell the user (1) what records must be kept, (2) who must keep them, and (3) how long they must be kept.

The GUIDE is formatted and numbered to parallel the CODE OF FEDERAL REGULATIONS (CFR) for uniformity of citation and easy reference to the source document.

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